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ABSTRACT

In 1993 the Citizens' Commission on Civil Rights concluded that the election of Bill Clinton as President presented a new opportunity to work toward equal opportunity. In 1995, at the midpoint of his first term, the Commission identified the new and often formidable challenges his administration was facing in dealing with issues of equal opportunity and fair treatment. In many respects, the Commission noted, the Clinton administration had made a good beginning in dealing with Federal civil rights performance, but that it remained at the beginning stages of a revitalization of civil rights enforcement. A particular problem was the slow pace of the Clinton administration in filling key civil rights positions, so much so that the Chair of the Equal Employment Opportunity Commission was not appointed until just before the 1994 election. Part One of this report presents the findings and recommendations of the Citizens' Commission in the context of welfare reform legislation. Part Two contains a series of working papers prepared by leading civil rights and public interest experts. These 17 papers deal with: (1) Federal resources and funding; (2) the administration of justice; (3) the U.S. Commission on Civil Rights; (4) the Equal Employment Opportunity Commission; (5) employment; (6) affirmative action; (7) welfare reform; (8) immigration; (9) rights of people with disabilities; (10) hate crimes; (11) English-only requirements; (12) voting; (13) housing; and (14) education. The papers on education focus on minority access to education, gender equity, and equal education in elementary and secondary schools. (SLD)

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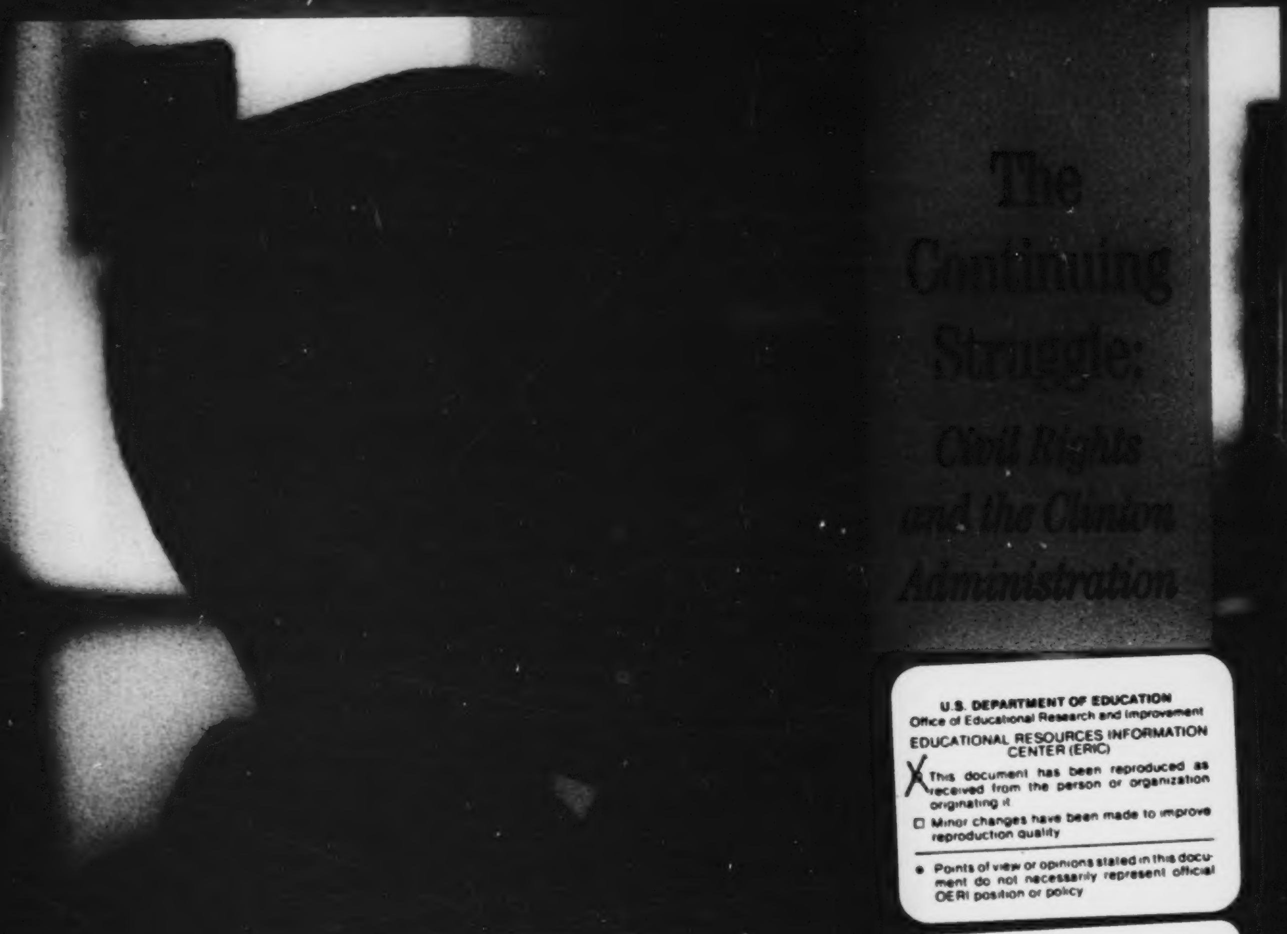

The Continuing Struggle:

Civil Rights and the Clinton Administration

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The Continuing Struggle:

Civil Rights and the Clinton Administration

Corrine M. Yu and William L. Taylor, Editors

Report of the Citizens' Commission on Civil Rights

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Foreword

The Citizens' Commission on Civil Rights is a bipartisan organization established in 1982 to monitor the civil rights policies and practices of the federal government and to seek ways to accelerate progress in the area of civil rights.

This study has two parts. Part One consists of the Report and Recommendations for the Commission. Part Two is a series of working papers prepared by leading civil rights and public interest experts, with some contributions by private practitioners. Several of these authors also contributed to the Commission's earlier studies of federal civil rights enforcement: *New Challenges: The Civil Rights Record of the Clinton Administration Mid-term* (1995), *New Opportunities: Civil Rights at a Crossroads* (1993), *Lost Opportunities: The Civil Rights Record of the Bush Administration Mid-term* (1991), and *One Nation, Indivisible: The Civil Rights Challenge for the 1990s* (1989).

The Commission gratefully acknowledges the support of the Ford Foundation for this study.

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Part One:

Report and Recommendations of the Citizens' Commission on Civil Rights

Chapter I

Introduction

For immediate release:
February 10, 1995

TWO ST. LOUIS MEN PLEAD GUILTY TO SPRAYING BLACKS WITH KOOL-AID

For immediate release:
June 15, 1995

JUSTICE DEPARTMENT SUES NEW MEXICO VILLAGE FOR DISCRIMINATION BASED ON NATIONAL ORIGIN

For immediate release:
November 14, 1996

FOUR MEN CHARGED WITH ENSLAVING MIGRANT WORKERS

For immediate release:
May 7, 1996

FLEET SUBSIDIARY TO PAY $4 MILLION TO SETTLE CLAIMS THAT BLACKS AND HISPANICS WERE CHARGED HIGHER LOAN PRICES THAN WHITES

These Justice Department announcements are stark reminders of a plague which remains in our nation today. They belie the notion, so popular with previous Administrations, that the nation has arrived at a blissful state of "color blindness," making obsolete the affirmative remedies and enforcement machinery that had brought progress in earlier times.

For immediate release:
March 30, 1995

JUSTICE DEPARTMENT OBTAINS $16 MILLION SETTLEMENT AGAINST AMERICAN FAMILY MUTUAL INSURANCE FOR ALLEGEDLY REFUSING TO INSURE AFRICAN AMERICAN HOMES

It has been more than 100 years since Justice John Marshall Harlan wrote in his lone dissent in *Plessy v. Ferguson* of a "color blind" ideal:

> *In the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color blind, and neither knows nor tolerates classes among citizens.*

Justice Harlan used the term as part of an effort — ultimately unsuccessful — to stave off the creation by states of a dominant class of citizens, which, at least in some areas of the country, amounted to an official caste system. Today, many have appropriated the "color blind" ideal as embodied in Justice Harlan's dissent for their own purposes having nothing to do with the struggle against discrimination.

For immediate release:
April 13, 1995

JUSTICE DEPARTMENT SUES LOUISIANA NIGHTCLUB FOR BANNING BLACKS

The reality, however, is that this nation has yet to reach the point where the great bulk of citizens are "color blind," where race has ceased to matter, and where children do not suffer disadvantage because of their race or national origin. Much evidence (documented by the Citizens' Commission on Civil Rights in its 1996 report, *Affirmative Action: Working and Learning Together,* and others) supports the conclusion that the lives of millions of people remain untouched by the civil rights movement and the opportunities and preferences others continue to enjoy. Just a sampling of the evidence that racial and gender discrimination remain a problem in employment, education, and contracting includes:

- the large number of complaints of employment discrimination filed with the Equal Employment Opportunity Commission;
- the record number of cases filed and the thousands of investigations commenced by the Justice Department;
- the testing studies conducted by the Fair Employment Council of Greater Washington and The Urban Institute showing the overall prevalence of discrimination encountered by minority job seekers;
- the findings of the 1995 bipartisan Glass Ceiling Commission (*e.g.,* that 97% of senior managers at Fortune 1000 industrial corporations are white males, and women, virtually all of them white, hold only 3-5% of senior management jobs in major companies);
- the evidence collected by the American Council on Education that minorities continue to be severely underrepresented among the faculty of American higher education institutions and in college enrollments;
- the separate findings of the Justice Department and The Urban Institute that discrimination at several levels has prevented minorities from acquiring the necessary technical expertise, from being able to secure needed capital, and gain access to public and private contracting markets; and
- the serious allegations of widespread sex discrimination at Mitsubishi and race discrimination at Texaco, to name but two of the most recent incidents.

For immediate release:
January 30, 1996

JUSTICE DEPARTMENT SUES NEW YORK CITY FOR ALLEGEDLY DISCRIMINATING AGAINST QUALIFIED MINORITY CUSTODIANS

The primary agency charged with enforcing federal civil rights laws, the Civil Rights Division of the

Department of Justice, has also documented the continuing legacy of racial and gender discrimination. In his authorization request for the Civil Rights Division for Fiscal Year 1996, Assistant Attorney General Deval Patrick gave the following examples:

> *In March, we indicted three men in Lubbock, Texas, who, according to the indictment, drove to the predominantly black section of that city hunting African Americans, lured three black men to their car, and then shot them at close range with a short-barreled shotgun. The three defendants passed the shotgun around and allegedly each took a turn shooting a black victim.*
>
> *In February, two Missouri men pled guilty to criminal civil rights violations after driving into a black neighborhood of St. Louis, again hunting for African Americans to victimize. From the front seat of their car, while someone in the back seat videotaped their actions for amusement's sake, the two white men sprayed more than 50 African Americans with a high-pressure fire extinguisher so strong it knocked some of the victims to the ground.*
>
> *White officers in a city police department in Florida admitted that the police department did not hire a black applicant for 30 years, routinely threw applications from blacks in the trash, and regularly used racial epithets in the workplace, up to and including the Chief of Police himself.*
>
> *In a Louisiana corrections center, the policy of not hiring women was unusually blatant. The minimum passing score on the required written examination was 90 for men, but 105 for women. In fact, one woman scored 100 on this written exam in April 1987, but was disqualified, while a year later, a male applicant scored a 79 and was hired despite the fact that he had a prior arrest and did not have the required high school diploma.*
>
> *In a California case not long ago, two young Hispanic couples with steady employment decided to move, literally, across the tracks into a condominium in a better neighborhood free of gang activity and drug traffic. When the condominium manager discovered that Latino residents were moving in, he told the real estate agent that he did not welcome their presence because Latinos were "given to multiplying."*[1]

For immediate release:

August 13, 1996

JUSTICE DEPARTMENT SUES WAUKEGAN, ILLINOIS FOR DISCRIMINATING AGAINST HISPANIC FAMILIES

It is clear that three decades after the enactment of the major civil rights laws, many Americans still grow up untouched by the civil rights laws and the access to services and opportunities which would make them full participants in society. A still-enormous body of evidence indicates that race and gender discrimination persist in this country. Moreover, there is evidence that the trend established by more than a decade of administrative neglect has served to exacerbate these forms of discrimination. The chapters that follow appraise the efforts of the Clinton Administration to restore enforcement of the civil rights laws and to reverse these trends.

Endnote

[1] Statement of Assistant Attorney General Deval Patrick before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. House of Representatives, Authorization and Oversight Hearing, July 20, 1995.

Chapter II

Presidential and Congressional Leadership in Civil Rights

I. The President

In 1993, the Citizens' Commission concluded that the election of Bill Clinton as President presented a new opportunity to set a course designed to realize the long-deferred goal of equal opportunity. In 1995, at the midpoint of his term, the Commission identified the new and often formidable challenges his Administration faced in dealing with issues of equal opportunity and fair treatment. Among these challenges were the need to formulate a comprehensive policy to provide opportunity to people who remain trapped in poverty and discrimination, as well as to confront the tensions posed by increased immigration, both legal and illegal. Not to be underestimated, the Commission noted, was the challenge posed by the changes resulting from the 1994 election.

In many respects, the Commission wrote, the Clinton Administration made a good beginning in its efforts to restore federal civil rights performance. Early actions included passage of the National Voter Registration Act and the Family and Medical Leave Act — both designed to promote equality and fairness — as well as the issuance of Executive Orders that called for increased leadership and coordination in the development and implementation of policies and strategies to address fair housing and environmental justice issues. With respect to his cabinet and other high-ranking positions, President Clinton delivered on his campaign promise to assemble an administration that "look[ed] like America," pulling together the most diverse group ever of women and minorities to fill these posts. In addition, the President's judicial selections were, compared to his two immediate predecessors, significantly more diverse and experienced.

Nevertheless, even at the midpoint of the term, government was still very much in the beginning stages in revitalizing civil rights enforcement and developing new policies to meet the needs of the 90s. This, we wrote, made "difficult a clear assessment of the effectiveness of the Administration in achieving civil rights objectives." For various reasons — including indecision, a reluctance to stand behind nominees whose views generated controversy, and a desire to achieve balanced racial and ethnic tickets at some agencies — the Clinton Administration had proven to be very slow in filling key civil rights positions. The slow pace of presidential appointments created a vacuum at civil rights agencies, necessitating the deferral of many important policy decisions and the creation of a backlog of issues for agency heads to deal with once they assumed office. All told, it would take the Administration nearly two years to fill key civil rights posts, a delay that the Commission observed "would prove to be damaging to hopes that momentum in key civil rights enforcement would be established."

A. Turnabout at Mid-term

The delay was so prolonged that the last key civil rights position — Chair of the Equal Employment Opportunity Commission — was not filled until five weeks before the 1994 election, when a new Republican majority swept into both Houses of Congress. As the Commission noted in 1995, this was a majority whose commitment to continued progress in extending equality of opportunity was in doubt. Accordingly, we warned of the new challenges posed by the changes resulting from the 1994 election — challenges not just for the Administration, but for Congress and the American people.

As we assess the Clinton Administration's record at the close of its first term, it is clear that, as the President's own advisors have acknowledged, the 1994 election was a watershed event, effectively dividing the Presidency into two distinct terms.

The second half of the term found the President pulling back from the activism of the first two years, relying instead for the most part on the power of the veto and the bully pulpit. In contrast to his first two years, during which he issued no vetoes, President Clinton issued 15 in the second half of the term. The President also began to carve out a modest — at least compared to the boldness of his campaign promises — social agenda, giving speeches on social issues such as schools, youth, and crime, as well as taking stands on school prayer and violence in the media. However, with one notable exception — its defense of affirmative action — the White House failed to provide further direction with respect to civil rights policy.

As he sought to regain his political footing at the beginning of his term's second half, President Clinton made remarkable turns to the right by acquiescing to reversals of deeply entrenched domestic policies. For example, after submitting a budget in early 1995 that called for modest spending cuts, the President, forced to make hard choices by the mid-term elections and the new Republican majority in Congress, chose to embrace his opponents' call for a balanced budget and the concomitant cuts in domestic spending balancing the budget would require. Nonetheless, Congress and the White House were unable to agree on the level of education, health, and environmental cuts, and the impasse which these negotiations produced actually twice closed the federal government for days, as budget deadlines passed.

Slowly, the President began to demonstrate his political resilience. Pinning the government shutdown on his opponents, the President made further strides toward winning the war on public opinion, pointing to a stable economy and shrinking budget deficit, and his fight to preserve essential government programs. By the summer of 1996, President Clinton had become candidate Clinton. But in his attempt to make good on his 1992 election promise to "end welfare as we know it," the President actually retreated drastically, signing into law a bill that ended welfare as an entitlement, allowed the termination of benefits even if jobs were not available to recipients, shifted much policymaking to the states, and eliminated many aid programs to the poor. While his political victories were evident in the wide margin he enjoyed on November 5, the President's decision to sign the welfare bill cost him the trust of many.

Such political actions by President Clinton — clearly linked to his re-election campaign — leave open the possibility of a "second term fix." But such actions call into question the Commission's earlier assessment of the President as a leader who, in contrast to his immediate predecessors, appeared to understand the role that affirmative government could play in eradicating the long legacy of discrimination and increasing opportunity in education, employment, and housing.

In its 1995 report, the Commission urged the President to hold fast to a commitment to affirmative remedies to increase opportunities for full participation in our society. The issue that would present President Clinton with the opportunity to demonstrate this commitment was affirmative action. As the Commission predicted in 1995, in addressing this issue, the President would encounter resistence from members of the new Republican majority in Congress. Eventually a broad scale attack on federal affirmative action policy emerged, embodied in legislation sponsored by Senator Robert Dole and Congressman Charles Canady. Significantly, the legislation represented a drastic change of course for Senator Dole, who had previously supported affirmative action and had helped defeat the effort to repeal the Executive Order on government contracts in the 1980s.

Following a five-month review of federal affirmative action programs, the Clinton Administration responded forthrightly to this new and formidable challenge to the policy. On July 19, 1995, the President announced his position on affirmative action:

> *Affirmative action has been good for America. Affirmative action has not always been perfect, and affirmative action should not go on forever. It should be changed now to take care of those things that are wrong, and it should be retired when its job is done. I am resolved that that day will come. But the evidence suggest, indeed screams, that that day has not come...*
>
> *Since, based on the evidence, the job is not done, here is what I think we should do. We should reaffirm the principle of affirmative action and fix the practices. We should have a simple slogan: Mend it, but don't end it.*[1]

In acknowledging the importance of affirmative action in today's society, the President underscored the value of the policy as a necessary — albeit insufficient — mechanism for providing mobility and opportunity for minorities and women. Moreover, the President recognized the role of affirmative action in benefitting *all* Americans by "closing gaps in economic opportunity in our society, thereby strengthening the entire economy."

B. Walking the Talk?

The affirmative action example demonstrates how the same President who could proclaim that "the era of big government was over," could nonetheless effectively use the bully pulpit to defend government activism and de-politicize the debate on affirmative action. The President's defense of affirmative government and core governmental services would prove to pay critical dividends, with the election exit polls ultimately showing that voters had rejected his opponents' anti-government stance.[2]

As the foregoing discussion demonstrates, however, the course followed by the Clinton Administration has hardly followed a straight line. Although the President's July 1995 affirmative action speech demonstrates the White House's capacity to respond to a crisis when necessary, the President has not put forth a positive agenda providing opportunity to those who still lack it.

And so in the wake of the re-election of Bill Clinton as President, the Commission renews once again its earlier call to the President to redirect the nation's energies from the divisiveness that has plagued the nation, and recommends action that the Executive branch should take to frame positive civil rights policies and assure strong enforcement. We urge the President to make civil rights a national priority again.

II. Congress

In 1995, the Commission wrote of the challenge posed by the changes resulting from the 1994 elections:

> *The gains that have been made over the past three decades have been made possible only because Republicans and Democrats stood together in Congress and elsewhere. But it is by no means certain that there remains a cadre of Republicans in the new Congressional leadership that is committed to continued progress in extending equality of opportunity. Some Congressional committee chairs may use their oversight authority to deter the use of affirmative civil rights remedies by federal agencies. Other threats to civil rights laws many come more indirectly, in the form of cutbacks in the collection of racial data, and in curtailing education, job training, and social service funds needed for the effective exercise of civil rights.*

Although, as expected, cuts to labor, health, and education programs were attempted, in the end many were stymied by election year pressures and the desire by the Republican majority to avoid blame for more government shutdowns. Instead, the most direct Congressional threat to affirmative civil rights remedies would come from an unlikely source — Senator Robert Dole, who in 1986 had helped ward off an attack on the affirmative action provisions of the Executive Order on federal contractors. In 1995, Senator Dole introduced legislation co-sponsored by Congressman Charles Canady designed to repeal virtually all government policies that used race or gender as a factor in promoting job opportunity for minorities and women. The Dole/Canady bill (the so-called "Equal Opportunity Act") prohibited federal agencies and their employers from "grant(ing) a preference to any individual or group based in whole or in part" on race, color, national origin, or gender. "Preference" was defined very broadly as "any preferential treatment" and was specifically "not limited to any use of a … numerical objective."

The Dole/Canady bill would have struck down even affirmative action that remedies specific, identifiable discrimination, and would have barred the federal government from entering into court-approved settlements to redress discrimination if the settlement included a "preference" as defined by the bill. Furthermore, while the bill explicitly prohibited only government affirmative action programs and policies, there was serious concern about how it would have affected voluntary affirmative action by employers or universities.

In mid-July 1996, Republican Congressional leaders announced that they would drop (at least for 1996) the broadside attack on affirmative action embodied in the Dole/Canady bill, in favor of a narrower attempt, favored by Representative Jan Meyers, Chair of the House Small Business Committee, to eliminate the 8(a) program. The 8(a) program, administered through the Small Business Administration and enacted in response to specific Congressional findings of widespread discrimination against minority contractors, is a business development program designed to assist socially and economically disadvantaged businesses. Representative Meyers' bill (entitled the "Entrepreneur Development Program Act of 1996") would strip the SBA of this contracting authority. The bill, introduced in August 1996, did not progress farther than a hearing in the Small Business Committee.

Another line of attack on affirmative action was launched in 1995 by Senator Phil Gramm, who had been Senator Dole's rival for the Republican nomination. Senator Gramm introduced anti-affirmative action legislation in the form of riders to appropriations bills (including an amendment which would have incorporated the Dole/Canady bill into the State-Justice-Commerce appropriations bill). All three of these anti-affirmative action amendments were defeated in the Senate.

The final days of the 104th Congress were taken up with intense activity on measures that called for a drastic change in government's commitment to serve those in need. Of these, probably the most significant was legislation that ended more than 60 years of the federal government's guarantee of assistance to the poor. The new welfare law adopts a block grant approach, giving states vast new authority and power over benefits. In addition, the legislation includes new eligibility restrictions, new limits on the duration of aid, new cuts to the food stamp program, and denies legal immigrants numerous federal benefits. Despite stated misgivings, the President, who during the 1992 campaign had pledged to "end welfare as we know it," signed the bill into law in August 1996.

Wrapped in Congress' omnibus spending package was legislation addressing illegal immigration. Among other things, the legislation increases funding for border patrols, expedites deportation procedures, and drops previous protections for immigrants seeking asylum. Congress was unsuccessful, however, in most of its attempts to restrict legal immigration, including an effort to include language in the bill that would deny benefits to legal immigrants.

On the other hand, Congress also passed separate measures designed to aid working Americans — one that raised the federal minimum wage and another that allowed workers to maintain insurance coverage if they lose or leave their jobs. In addition, a measure to ban employment discrimination based on sexual orientation, the Employment Non-Discrimination Act (endorsed by the Commission in 1995), was narrowly defeated in the Senate, by a 49-50 vote.

In its 1995 report, the Commission noted its concern that "some Congressional committee chairs may use their oversight authority to deter the use of affirmative civil rights remedies by federal agencies." As matters turned out, our fears were not overstated. As one member of the House Committee on the Judiciary observed, the House Subcommittee on the Constitution in the 104th Congress held numerous hearings on proposals to curb civil rights remedies, but none on the persistence of discrimination.

In the 1950s and 1960s, Congress established mechanisms for gathering facts on the pervasiveness of discrimination, a process that led to the adoption of the contemporary civil rights laws. If Congress is to have any legitimate basis for cutting back on remedies adopted under these laws, it must launch an investigation into whether pervasive institutional discrimination is a thing of the past. The evidence of the *Texaco* case and other recent cases suggests that Congress cannot in good conscience reach the conclusion that affirmative remedies are no longer needed.

And as Assistant Attorney General Patrick stated in his authorization request to Congress, "in order to oppose discrimination in theory, you must have vigorous enforcement in fact, and you need a strong and effective array of tools to address the problem."[3] The Commission offers this report to Congress in the hope that it will assist them in addressing the steps that must be taken to set the nation on the path to equality of opportunity once again.

III. The Continuing Struggle: A Challenge to the Clinton Administration

In 1903, W.E.B. Du Bois predicted that the problem of the twentieth century would be "the problem of the color line." As we approach the millennium in a nation still roiled by racial and ethnic conflict, the validity of DuBois' prediction threatens to extend into the next century. One of the things we have learned is that law can be a powerful tool in rectifying discrimination and in creating opportunities that the law once denied. The evidence of this is in the striking progress that many people of color, women, and disabled people have made in the last three decades through affirmative action programs and other affirmative steps by government and the private sector to increase opportunities in employment, education, and housing. But at the same time we have learned how entrenched prejudice and fear remain in this nation and how much damage they have inflicted on their victims. The evidence of this is distressingly available in the lives of black and Latino children born into great concentrations of poverty in inner cities and growing up with no real hope of educational or economic advancement. It can be seen in the struggles of single mothers for economic security, in the continuing efforts of disabled people to overcome stereotypes in order to prove their potential, in the racial and ethnic conflicts that have erupted in Los Angeles, Crown Heights, St. Petersburg, and elsewhere.

As the Clinton Administration embarks on its second term, the President, the Congress, and the nation face a number of formidable challenges. New social science research as well as the practical experience of many decades tells us that the enormous racial and economic isolation suffered by blacks and Latinos in the inner cities of the nation stunts their educational and economic development and contributes to a pathology that poisons the environment for all who lack the means to escape. The President has spoken with understanding and empathy about the plight of people who are trapped in these circumstances, but he has yet to propose policies that will enable people to change their lives. Indeed, the drying up of housing subsidies for low- and moderate-income families is choking off one of the few effective means that people have had to obtain decent shelter and improve their economic prospects. In addition, recent Supreme Court decisions terminating school desegregation remedies threaten to return hundreds of thousands of children of color to schools with large concentrations of poverty, leaving them with drastically reduced educational opportunities.

It is a measure of the regression the nation has suffered that these matters, discussed forcefully in the Kerner report and other reports of that era, are rarely mentioned in the national policy dialogue today, and are certainly not the subject of policy recommendations. Nor, despite the conventional wisdom that state governors and legislators will do a better job than the federal government in devising solutions to problems, is there wisdom and courage emerging from the statehouses of the nation on how to deal with issues of racial and economic deprivation. It is the view of the Commission that there is no more urgent task facing the President than explaining to the nation how these great concentrations of poverty and hopelessness that exist in cities and some rural areas disserve the interests of all Americans and developing a program of action at all levels of society to combat poverty, deprivation, and discrimination. The prospects that Congress will embrace and fund such an effort may be slim but the President's effort may lay the foundation for future success and we believe that history may judge him harshly if he does not at least try.

The one step that the President and Congress have taken over the past four years that will have the greatest impact on minorities and the poor is the enactment of the so-called welfare reform bill. It is apparent already that even if the legislation is successful in forcing large numbers of people off the welfare rolls and into the workforce, it will do little to improve the plight of the poor. The jobs that will be available to most (if jobs are available at all) will be low-skill and low-wage. It recently has been reported that the numbers of people forced to devote 50% or more of their incomes to obtaining housing have increased rapidly in recent years and that most of these are people who have jobs. People who must spend 50% of their incomes for rent obviously are not in a position to provide adequate nutrition or health services for themselves and their families. So the mere transfer of people from welfare to low-paying jobs will not necessarily improve the opportunities and economic prospects of parents or their children. But the new welfare law is silent on these matters as it is on the subject of providing adequate day care for parents expected to work and on the utility of forcing young women struggling for college degrees to leave school in order to take low wage jobs.

A key challenge for the Clinton Administration is to monitor carefully the implementation of the welfare law and to report on its successes and failures in helping people to lead productive lives. Another challenge is to assure the provision of housing, health, nutrition, education, and day care services that are vitally needed if welfare reform is to have any positive meaning. Still another critical challenge in this area is for the Clinton Administration to propose macroeconomic and economic development policies which, along with education and training programs, will assure that skilled remunerative jobs will be accessible to poor people. These policies must go far beyond the offering of subsidies to employers to locate some jobs in "empowerment zones" in inner cities.

The final challenge to the Clinton Administration is to maintain its spirited defense of affirmative action policy ("mending" whenever necessary to assure that the policy is properly implemented) while stepping up the federal drive to enforce the civil rights laws. One of the more unattractive aspects of this nation's long history on race issues is a seemingly infinite capacity to rationalize inaction in dealing with discrimination. So, in the waning years of the nineteenth century, it was possible for a Supreme Court justice to say, in explaining a decision to narrow Reconstruction civil rights laws drastically, that the time had come when black people should "cease to be the special favorites of the law." Now in the waning days of the twentieth century, we hear that affirmative action must end because we are a "color blind society." While the status of people of color has improved materially in recent years, it takes a special brand of myopia not to say moral blindness to conclude in the year of the Texaco and other discrimination scandals that race no longer matters in American society and that affirmative action is no longer needed. The remedy is to continue the struggle against discrimination in all its forms and manifestations. While leadership at all levels is needed, history from Abraham Lincoln to Lyndon Johnson teaches that progress occurs when Presidents are prepared to educate citizens and take decisive action.

If President Clinton will exercise leadership, there is every reason to believe the nation will make more progress. Despite the persistence of racial and ethnic tensions, today in the nation there are an increasing number of communities, workplaces, and college campuses where people live, work, and study together, productively and in harmony. Despite the tensions spurred by the increased immigration of people of color from around the world, the new diversity is enriching our society and increasing our economic strength. So it is possible to envision a day when the "problem of the color line" will no longer be the problem of American society and when we can celebrate the benefits of diversity in the knowledge that everyone's talents and potential can be developed to the fullest.

Endnotes

[1] Remarks by the President on Affirmative Action. July 19, 1995.

[2] "By Splitting Vote, Americans Back Status Quo," *Wall Street Journal*, November 6, 1996.

[3] Statement of Assistant Attorney General Deval Patrick before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. House of Representatives, Authorization and Oversight Hearing. July 20, 1995.

Chapter III

Recommendations of the Commission

The Commission offers the following recommendations designed to make tangible the promise of equal opportunity.

Presidential Leadership and Appointments

1. **Reaffirm National Commitment to Equal Opportunity**
We recommend that the President reaffirm our national commitment to equal opportunity for all Americans by exercising moral leadership to bring the diverse threads of America together.

In our 1995 report, the Commission urged the new President to help re-establish a national consensus that every American should be given the opportunity to succeed. Two years later, faced with strong evidence of continuing discrimination and intergroup conflict, we renew our recommendation, and urge President Clinton to make assuring equality of opportunity for all persons one of his Administration's highest priorities for the second term. Although the President has taken important steps in this direction, there is much more that he and his Administration can do to move the nation forward in the civil rights area. Strong enforcement of civil rights laws and court decisions and support for the enactment of other legislation are essential to provide access to equal opportunity.

2. **Support Efforts of Civil Rights Working Group**
We recommend that the President renew the mandate of the Civil Rights Working Group that he created last term and make support for the Group's work a high priority for his Administration.

In our previous reports, the Commission urged the President to establish an interagency, Cabinet-level task force to address immediately the problems of intergroup tensions and conflicts, and to develop and submit to him within 60 days a coordinated action plan for dealing with the causes and consequences of these conflicts. We recommended further that this task force include representatives from the Executive Office of the President, the heads of all Departments, as well as representatives from the U.S. Civil Rights Commission and the Equal Employment Opportunity Commission.

In our 1995 report, we noted that the Administration had addressed one part of this recommendation by establishing a Civil Rights Working Group, whose mission was to "identify barriers to equal access, impediments to effective enforcement of the law, and effective strategies to promote tolerance and understanding in our communities and workplaces" and to otherwise "evaluate and improve the effectiveness of federal civil rights enforcement missions and policies." Named as co-chairs of the Working Group were the Attorney General and the Director of the Office of Management and Budget, with the following Administrative officials serving as members: Secretary of the Treasury, Secretary of Commerce, Secretary of Agriculture, Secretary of the Interior, Secretary of Education, Secretary of HHS, Secretary of HUD, Secretary of Labor, Secretary of

Transportation, Secretary of Veterans Affairs, Administrator of EPA, Chair of the EEOC, Assistant to the President for Economic Policy, Assistant to the President for Domestic Policy, and the Assistant to the President and Director of Public Liaison. The President also invited the Chairperson of the U.S. Commission on Civil Rights to participate on an informal basis, as well as encouraged all Cabinet officers and agency heads to participate.

In his Executive Order establishing the Working Group, the President directed the Group to "advise appropriate Administration officials and me on how we might modify federal laws and policies to strengthen protection under the laws and on how to improve coordination of the vast array of federal programs that directly or indirectly affect civil rights," and to provide a progress report regarding its activities no less than every six months.

Although the President is to be commended for establishing the Working Group, it is clear that the Group has fallen short of its directives and designated time frames. The need for such an interagency task force still exists, not only to develop an action plan for dealing with the causes and consequences of increasing intergroup conflict but also to address specific threats to civil rights remedies, such as those posed by California's Proposition 209, which threatens to end all non-court-ordered state affirmative action programs in public education, employment, and contracting.

3. Designate a White House Official with Responsibility for Civil Rights Policy

We recommend that the President vest civil rights responsibility with an official in the White House who reports directly to the President. This official's responsibility should include providing guidance and direction to agency and department heads.

In our 1995 report, the Commission wrote that one manifestation of the White House's failure to provide clear direction on civil rights policy is the absence of a person at the White House with designated civil rights responsibility.

After four years, this gap continues to be a glaring one. While the President moved decisively to assure that the threat to affirmative action was handled by people with civil rights expertise and sound policy judgment, the need is not limited to crisis management. Such an official is needed to help develop a comprehensive policy to provide opportunities to those trapped by poverty and discrimination in cities throughout the nation. Such a person is needed more than ever to provide coordination where civil rights issues cross policy lines, and to provide guidance and, on occasion, political assistance where civil rights issues are controversial or sensitive.

4. Appoint Judges with Commitment to Equal Justice Under Law

We recommend that the President require his judicial nominees to share his commitment to equal justice under law. We also urge the President to continue his pledge for diversity in his judicial appointments by including in his selections qualified women and minorities committed to equal justice under law.

The President has already named a good many highly qualified and distinguished attorneys to the federal courts who reflect the diversity of America and share his commitment to equal justice under law. Even so, for various reasons, including a reluctance to nominate or support candidates thought to be "controversial," as well as delays in the nomination and confirmation process, the President has hardly made a dent in the largely conservative judiciary appointed by his Republican predecessors.

It is important that vacancies be filled with qualified women and minorities who share the President's commitment to equal justice under law. The President should consider people with varying backgrounds and views, provided they have a commitment to equal justice under law. As the Commission noted in its 1995 report, it is especially important for the President to avoid backing away from potential nominees with distinguished records and strong commitment to equal opportunity simply because they may be controversial. It is also critical that the Republican leadership in the Senate abandon the tactics of delay and unfair opposition that politicized the process last term and return to the bipartisanship that has historically characterized the nominations process.

5. Develop Comprehensive Urban Policy to Provide Opportunity to Economically Disadvantaged Citizens

We recommend that the President develop a comprehensive urban policy designed to provide opportunity to economically disadvantaged citizens, particularly minorities who live in high concentrations of poverty in inner cities.

In our 1995 report, the Commission wrote that almost all of the public discussion about inner cities centers on pathology and concerns proposals to institute punitive measures such as cutoffs of welfare benefits to unmarried mothers and more stringent sentences for repeat criminal offenders. Whatever the merits of such proposals may be, they deal almost exclusively with how to deal with problems after they have arisen rather than with prevention. Accordingly, we stated that it was vitally important that the new Clinton Administration develop and present an alternative (or complementary) vision.

The new welfare legislation that the President recently signed into law is the most obvious manifestation of the pathology-driven focus noted by the Commission in its 1995 report. Many barriers will need to be overcome if the welfare reform policies embodied by the new law are to be effective, including:

- the lack of remunerative work in central cities;
- the lack of education and training to prepare people for work;
- the lack of critical services such as health care that are needed to support families and help people prepare for remunerative work.

Moving people from welfare to work will be of little utility if the work is so unremunerative that people cannot afford necessities such as adequate health care and shelter, support their families, and provide better prospects for their children. A comprehensive urban policy which addresses these barriers is vitally important.

This policy should address such basic and critical needs as immunization and health treatment, adequate nutrition, job training, and education. It should deal with housing opportunities in cities and suburbs and how economically disadvantaged citizens will be given access to public services on terms that will give them the same kinds of opportunities as those enjoyed by the more affluent. It should also address how economic measures such as empowerment zones will provide effective incentives for job creation in inner cities.

President Clinton should also discuss candidly the barriers that continued racial prejudice and misunderstanding pose to constructive solutions to our urban problems and the ways in which we can surmount barriers of racial prejudice and fear.

6. Revitalize the Equal Employment Opportunity Commission

We recommend that the President make revitalizing the Equal Employment Opportunity Commission a high priority for his Administration.

While the Clinton Administration made a good beginning in its efforts to revitalize the Equal Employment Opportunity Commission, much more can be done to fully revitalize the nation's lead EEO enforcement agency. First, EEOC leadership should commit themselves, beyond making public statements and directives, to using systemic approaches to law enforcement, such as class action lawsuits. In working up its investigations and charges, the Commission should actively use employment "testers" as an additional tool for investigating and uncovering systemic discrimination. Second, the EEOC's 1996 agreement with the Federal Mediation and Conciliation Service carries much potential to reduce the agency's backlog of complaints, it is important for the EEOC to ensure that its ADR programs be accompanied by appropriate safeguards to ensure fairness to discrimination victims. Third, it remains important for the EEOC to issue guidance to employers about unresolved issues relating to employment protections. Finally, the EEOC should take assertive positions in its regulations, policy guidelines, and litigation, to ensure that federal anti-discrimination laws accomplish their remedial purposes.

7. **Revitalize the United States Commission on Civil Rights**
   We recommend that the President make revitalizing the United States Commission on Civil Rights a high priority for his Administration.

A strong, independent, bipartisan United States Commission on Civil Rights could make an important contribution to monitoring federal civil rights enforcement and could help shape the future direction of federal policy that seeks to provide equal opportunity for all Americans. A revitalized Commission, by combining its fact-finding powers with a renewed sense of mission, could again become a significant voice in identifying and seeking solutions to the critical problems confronting our nation in the field of civil rights.

President Clinton made an important first step toward remedying the Commission's loss of stature and direction by appointing Chair Mary Frances Berry. He should continue these efforts by supporting additional funding for the agency, as well as by opposing legislative efforts to restrict the tools — such as its fact-finding powers — needed by the Commission to perform its mission.

Federal Civil Rights Policies and Remedies

8. **Provide Necessary Tools for Enforcement**
   We recommend that the President send a clear message to all federal departments and agencies that he expects civil rights laws to be enforced by ensuring that the agencies receive the tools needed to perform law enforcement and to implement appropriate monitoring and information collection policies.

The decline of civil rights enforcement during the 1980s was marked by a diminution of resources to perform law enforcement, failures to investigate and monitor, and the failure by enforcement agencies to collect the data necessary to assess compliance with civil rights laws.

Effective law enforcement is not possible without adequate resources. A critical task for the Clinton Administration in the next term is to ensure that the civil rights law enforcement agencies have the tools needed to perform their mission. An important aspect of the challenge is to assure that civil rights protections are afforded in programs such as welfare where power and responsibility have devolved to the states through block grants.

This does not necessarily mean significant increases in agency appropriations. When statistical data is collected and analyzed properly, the agency may detect patterns or practices that can be investigated and resolved more efficiently than on a complaint-by-complaint basis. When agencies establish effective mechanisms for early resolution of cases through conciliation or other means of alternative dispute resolution, they save the costs of later investigation and enforcement. When department and agency heads provide clear regulatory guidance on the steps needed to comply with the law, and make clear their willingness to employ sanctions against violators, many institutions will comply without the need for protracted agency litigation.

In addition, investing in the professional development needed to assure that staff possess skills in statistical analysis, negotiation, dispute resolution, and other areas, will pay dividends in cost-effective performance.

In the end, of course, ineffective enforcement which permits discrimination to continue causes additional economic loss to the nation in wasted potential.

The ill-advised decision by the Department of Education's Office for Civil Rights to suspend data collection for 1996 provides an example of the continuing need for vigilance on this issue.

For all these reasons, President Clinton should make clear his intention to ensure that all federal civil rights agencies have the tools needed to perform their mission effectively.

9. **Use Affirmative Remedies for Violations of Civil Rights Laws and Encourage Use of Affirmative Action Plans**
We recommend that the President direct the departments and agencies of the federal government to continue to use affirmative action remedies for violations of the civil rights laws and to encourage the use of voluntary affirmative action plans.

In its 1995 report, the Commission wrote that after years of bipartisan support, federal affirmative action policy had become politicized recently. Today, although supported by the Clinton Administration, the utility of affirmative action as a remedial tool is being undermined by attacks on the concept by the courts, as well as by federal and state legislatures. Recently, California voters passed Proposition 209, which threatens to end all non-court-ordered state affirmative action programs in public education, employment, and contracting. In the wake of Proposition 209's passage, it is expected that affirmative action opponents in other states will seek to offer or revive similar state initiatives.

President Clinton has concluded that affirmative action policy works and moreover, that society cannot afford the costs of its abandonment. He and his Administration have taken strong and reasoned positions in defense of the policy. The Commission recommends that the President reinforce these actions by sending clear messages to all federal departments and agencies that he expects them to enforce civil rights laws and affirmative action remedies. Joining in the court challenges to Proposition 209 as well as combatting similar assaults on affirmative action elsewhere would also demonstrate the Administrations commitment to the policy.

10. **Further Equal Educational Opportunities**
a. We recommend that the President direct the Departments of Justice and Education to provide guidance on the appropriate criteria for deciding whether school districts have reached unitary status.

In prior reports, the Commission has stated its view that school desegregation decrees should not be dissolved until all vestiges of prior discrimination have been eliminated. These vestiges include housing discrimination, as well as educational deficits that continue as a result of prior school desegregation.

As the Commission has noted in previous studies, school desegregation remedies when properly implemented have been an important tool in improving the educational performance of minority children and providing them with access to higher education and employment opportunities. To permit a return to segregation would place major barriers in the path of the Clinton Administration's professed goal of preparing all children for the education and employment challenges of the next century.

Critical questions still remain concerning the dissolution of desegregation orders and government policy in this area. This is especially true in the wake of the Supreme Court's 1995 decision in *Missouri v. Jenkins,* which among other things held that attempting to attract white students back into the Kansas City school district from the suburbs was not a legitimate basis for requiring the state to fund educational improvement programs. The Departments of Justice and Education should provide guidance on the appropriate criteria for deciding whether school districts have reached unitary status. Such guidance should make clear that states and school districts are responsible for eliminating as far as practicable the housing and education vestiges of segregation.

b. We recommend that the President direct the Department of Education to vigorously monitor implementation of the provisions of the Elementary and Secondary Education Act designed to ensure that children with limited English proficiency (LEP) are not denied educational services under Title I.

Inflation and years of neglect by government officials in prior administrations have taken a large toll on the programs to provide services to language minority students. At the same time, the population of children with limited English proficiency continues to rise. Serious attention must be given to the needs of this growing population.

Despite the fact that they are eligible for educational services, there is evidence that language minority students are not being adequately served. For example, in many instances, language minority students are inappropriately placed in special education classes solely because of their limited English language skills.

Accordingly, the federal government must take the lead in vigorously monitoring implementation of the provisions of the Elementary and Secondary Education Act designed to ensure that LEP children are not denied the educational services to which they are entitled. Often school districts incorrectly assume that help for LEP children in reading is being afforded through bilingual programs and that Title 1 resources need not be made available.

> *c. We recommend that the President direct the Department of Education to institute an investigation of the ways in which tracking and ability-grouping deny equal educational opportunity to minority students, and provide guidance to states and local school districts on how to eliminate violations and substitute nondiscriminatory policies that are educationally sound.*

In-school segregation is an acute problem even in school districts that have been under court order to desegregate school buildings. Devices that easily lead to in-school segregation include tracking and other forms of ability-grouping, which result in isolation of students for significant portions of the school day on the basis of race and socioeconomic status.

With few exceptions, ability-grouping routinely denies educational opportunity to children of color, LEP children, and children from low-income families, for these children are disproportionately tracked into lower-achieving classes. Although proponents of ability-grouping justify the practices on educational grounds, increasingly, researchers have determined that tracking and other practices work significant harm on children in the "lower" tracks, while yielding scant, if any, real improvement in achievement for those in the "higher" tracks. Moreover, the underlying methods to select children for tracks (including assessment instruments and teacher evaluations) may themselves be culturally or racially biased.

Finally, educationally sound instructional approaches are available as an alternative to tracking. They are premised on the belief, now commonly accepted by educators and policymakers, that all children can learn advanced, challenging academic content. These efforts, which focus on improving teacher and school expectations for disadvantaged students, include intensive teacher training, cooperative learning and team projects, tutoring, and extended time on task (*e.g.,* before and after school programs).

11. Defend Minority Opportunity Districts

We recommend that the Department of Justice (a) continue to defend vigorously Congressional districts drawn up with the purpose of enhancing the electoral influence of minority citizens; (b) continue to press forward with challenges to political districting systems that systematically prohibit minority communities from electing candidates of their choice; and (c) consider, in appropriate circumstances, the exploration of alternative districting devices. The Department should also participate in cases involving state districts where similar issues are involved.

In the recent cases *Shaw v. Reno, Miller v. Johnson, Shaw v. Hunt,* and *Bush v. Vera,* the Supreme Court has imposed increasingly more difficult impediments to the creation of Congressional districts designed to enhance the voting influence of minority citizens and has denounced such districts as "racial apartheid." These decisions ignore the long history of racial discrimination against minority citizens and the persistence of racially polarized voting patterns. Absent affirmative efforts to enhance their voting influence, minorities in many states will continue to be shut out of opportunities to elect candidates of their choice.

The Department of Justice has demonstrated its commitment to aggressive enforcement of the Voting Rights Act by establishing a voting rights task force that has involved the Department in court challenges in these cases. We urge the Justice Department to continue to defend vigorously minority opportunity districts in court, as well as to press its challenges to districting systems that systematically prohibit minority communities from electing candidates of their choice. The Department should also participate in cases involving state districts which raise similar issues. We also urge the Department to educate the public on the continuing need for positive action on voting rights. The Department should also consider, in appropriate circumstances, encouraging the exploration of alternatives such as multi-member districts that utilize cumulative voting mechanisms — which enable minority voters as well as members of all possible groups to enjoy greater electoral opportunities.

12. Enforce National Voter Registration Act

We recommend that the Clinton Administration ensure compliance with, and aggressively defend against assaults to, the National Voter Registration Act.

The National Voter Registration Act, which went into effect in most States on January 1, 1995, is intended to increase electoral participation by eliminating existing barriers to voter registration. In its 1995 report, the Commission wrote that the Act was expected to play an important role in restoring faith in the democratic process by enlarging the pool of voters as well as by ensuring that registration processes are implemented in a nondiscriminatory manner.

The Act has succeeded in expanding voter rolls, although it is clear that community outreach efforts are needed to inform newly registered voters how to exercise their rights once registered. Moreover, although the Clinton Administration has successfully defended the Act against challenges, it remains critical for the Administration not only to ensure compliance with the Act, but also to aggressively defend against efforts to nullify the Act's protections.

13. Promote Public and Private Efforts to Meet Challenges Posed by Intergroup Tensions and Conflicts

We recommend that the President use his bully pulpit to promote public and private efforts to meet the challenges posed by intergroup tensions and conflicts. He and his cabinet should identify initiatives that have been successful in reducing prejudice, building democracy, encouraging citizen action, and other training and education outreach measures designed to address the causes and consequences of these conflicts.

In previous reports, the Commission stated that the dismal state of ethnic and race relations was a critical domestic issue confronting the nation, and noted that the growing tensions between groups threatened to undermine the nation's economic and moral progress.

The problems of intergroup tensions and conflicts have, if anything, grown worse and need to be addressed even more urgently. The U.S. Commission on Civil Rights and the Department of Justice's Community Relations Service, as well as other agencies, have roles to play in addressing the causes and consequences of these tensions and conflicts. Private organizations (including this Commission) certainly would respond to a call to provide assistance in this effort.

14. Oppose Threats to Rights of Immigrants

We recommend that the Administration oppose threats to equal opportunity for immigrants contained in legislation such as California's Proposition 187 and other immigration reform legislation, both adopted and proposed. We also recommend that the President work to restore cuts to assistance to legal immigrants contained in the new welfare law.

In its 1995 report, the Commission described the threat to equal opportunity and to the Supreme

Court's *Plyler v. Doe* decision (holding it was unconstitutional for a state to deny free public education to children of undocumented aliens) posed by California's Proposition 187, which would deny public education, non-emergency health care, and social services to undocumented immigrants. The Commission renews its recommendation that the Justice Department support challenges to Proposition 187, and expands it to extend to other legislative threats to immigrant rights that have since been raised in Congress. For example, the new welfare legislation signed by the President contains deep cuts to aid to legal immigrants — assistance which helps immigrants in becoming self-supporting, contributing citizens. Congress also passed legislation restricting illegal immigration that includes provisions to expedite deportation procedures barring judicial review for aliens convicted of certain crimes and abandons previous protections for aliens seeking asylum. Although the White House was successful in staving off an attempt to include restrictions to legal immigrants in the bill, it is expected that efforts to restrict legal immigration will be renewed in the next Congress. The President has indicated that he will undertake to "soften" the harsher provisions of the welfare law, including those pertaining to immigrants. He and his Administration can demonstrate their willingness to hold fast to that commitment by working to restore the cuts in assistance to legal immigrants contained in the law, as well as by continuing to oppose attempts to deny legal immigrants public benefits.

15. Protect the Rights of Language Minorities

We recommend that the Clinton Administration make efforts to protect the rights of language minorities a national priority. In particular, we urge the Administration to vigorously support and enforce the programs and protections, such as bilingual voting provisions, that are needed to give language minorities access to the equal opportunity promised them by civil rights laws.

With the rise in immigration there has been a resurgence of nativism, manifested in part by legislative efforts to repress foreign languages. Proficiency in English is an essential attribute of citizenship. But care must be taken to ensure that such efforts do not create new barriers for citizens not yet proficient in English, and hinder such rights and duties of citizenship as voting or receiving essential government services. For example, efforts to abolish bilingual voting provisions and to restrict educational programs that make some instructional use of a student's native language serve to exacerbate tensions without accomplishing legitimate objectives.

Furthermore, such language restrictions can play a key role in national origin discrimination. Accordingly, we urge the Clinton Administration to make enforcement of civil rights laws designed to protect language minorities a national priority. In addition, the Administration must continue its efforts to address the critical needs of the rapidly increasing number of language minorities, and to support and maintain the programs that are needed to give these Americans access to the equal opportunity promised by civil rights laws.

16. Support the ADA

We recommend that the President support the continued strength of the Americans with Disabilities Act.

In 1991, we noted that perhaps the most important consequence of the Americans with Disabilities Act (ADA) would be to help change the way America treats persons with disabilities, paving the way for greater participation by disabled citizens in all aspects of society.

In its 1995 report, the Commission wrote that in the wake of the November 1994 elections, attacks on the ADA and on disability civil rights had surfaced, threatening the fulfillment of the promises of the Act. Those Congressional attacks have continued today. Although the federal agencies charged with enforcing the ADA have placed a high priority on its enforcement, they need adequate resources to do so. The response of the Clinton Administration will be a gauge of the extent and depth of the President's support of disability rights. We urge the President to work vigorously to protect the civil rights of persons with disabilities, and to support the continued strength of the ADA.

New Legislative Remedies

17. Close the Minority Health Gap

We recommend that the President make improving minority health and closing the health gap between whites and minorities a national priority.

Because minority Americans are less likely than other groups to be covered by private health plans, universal health benefits coverage should have a substantially beneficial impact on minorities, expand their access to health care, and thereby help reduce the health gap.

Since the setback imposed by his earlier failure to enact a broad-ranging health care initiative, the President has moved incrementally, supporting, for example, a bill that allows workers to maintain insurance coverage if they lose or leave their jobs. For the new term, President Clinton has indicated that he would push for expanding access to health insurance for children, large proportions of whom are minority. We urge the President demonstrate this commitment by proposing measures that will address the critical health needs of the poor and disadvantaged.

18. Ensure that New Legislation Does Not Impair Civil Rights Programs and Safeguards

We recommend that Congress take steps to ensure that legislation designed to reduce regulation or accomplish other legitimate legislative objectives does not impair civil rights programs and safeguards.

Legislation designed to reduce regulation or accomplish other legitimate objectives may have the effect of impairing civil rights enforcement and the realization of equal opportunity. For example, proposals to reduce the paperwork burden of private industry may prevent the collection of racial and ethnic data needed to enforce the civil rights laws. The Congressional leadership should establish procedures for examining all legislation to which it wishes to give priority, to ascertain its effect on civil rights. Where there is a potential adverse impact, the legislation should be deferred until adequate civil rights protections are devised.

19. Support Passage of Pending Legislation on Equal Employment Opportunity, Equal Remedies, and Justice for Wards Cove Workers

We recommend that the President support passage of the following civil rights legislation:

The Employment Non-Discrimination Act

The Employment Non-Discrimination Act is new legislation modeled after Title VII of the Civil Rights Act of 1964 and is designed to cover the same entities as Title VII without disturbing Title VII's protections against discrimination based on race, color, national origin, gender, and religion. The Act prohibits employers from discriminating against any employee, gay or heterosexual, based on that employee's perceived or actual sexual orientation. (Unlike Title VII, however, employers would not be required to justify neutral practices that have a disparate impact on people of a particular sexual orientation or to engage in affirmative action.)

The Act has received support from an impressive coalition of civil rights groups, gay rights groups, religious groups, women's groups, and Democratic and Republican members of Congress. In the last Congress, the Act was only narrowly defeated in the Senate by a 49-50 vote. Endorsement of the Act would demonstrate a firm commitment to ensuring and expanding equal employment opportunity for all.

The Equal Remedies Act

The Equal Remedies Act would ensure that victims of intentional, on-the-job discrimination on the basis of gender, religion, and disability receive full damages to compensate their losses. The Civil Rights Act of 1991 places an arbitrary cap on damages for victims of such discrimination — a cap that does not exist for victims of race or national origin discrimination.

The Equal Remedies Act will remove the damages cap and so establish for all groups the full range of remedies that only some now enjoy. The availability of damages coupled with stronger alternative dispute resolution procedures at the EEOC may provide real incentives for out-of-court settlements of meritorious discrimination claims.

The Justice for Wards Cove Act

The Justice for Wards Cove Act is also designed to eliminate a loophole created by the Civil Rights Act of 1991. That Act reversed the Supreme Court's 1989 Wards Cove decision for all Title VII claims except for those of the original plaintiffs in that case. Simple fairness requires that the Wards Cove workers be covered by the new legal standard created by the Civil Rights Act of 1991, and receive the protection of that law.

Finally, we recommend that the President, the Congress, the Attorney General, the Assistant Attorney General for Civil Rights, the Secretaries of the Departments of Health and Human Services and Housing and Urban Development, and the Chairs of the Equal Employment Opportunity Commission and the U.S. Commission on Civil Rights, and other appropriate subcabinet and agency officials review and give serious consideration to the recommendations of the authors of the working papers in Part Two of this report.

Part Two:

Working Papers

Chapter IV

The Powerful Hand of Devolution

by Gary D. Bass

When most people today mention the term devolution, they tend to think of block grants, budget cuts, and, most recently, welfare reform. However, devolution includes a broader agenda that has mostly to do with giving local control to issues and policies that were once the domain of the federal government. This battle between federal and state/local control is not new; it has been a part of the public debate since the founding of our country. What is new is that a variety of federal social programs and public protections have developed over the past 20 to 30 years which make the stakes in this debate much greater than ever before.

In other words, devolution is no longer simply a philosophical debate about how the Constitution is to be interpreted, and no longer just a debate among academics. It is at the heart of congressional actions and has practical implications for low- and moderate-income Americans, minorities, and the nonprofit sector providing services to those in need. Thus, it is critically important for the civil rights community to monitor and assess the Clinton Administration's actions with regard to efforts to devolve federal responsibilities.

Overall, the Clinton Administration strongly endorses limited federal government and strengthening the hand of states. This is seen in the President's effort to reinvent government where a heavy emphasis is placed on increasing local flexibility. But the major set of actions to devolve federal responsibilities have come from Congress over the past two years, with the President trying to shape the agenda or flat out oppose it.

This paper traces a "sleeper" bill, the Local Empowerment and Flexibility Act, which was a major devolution bill that died at the last second in the 104th Congress and will be resurrected in the 105th Congress. It then turns to other efforts to grant local control that affect the civil rights community, including a new charity tax credit proposal, action on federal mandates, and general regulatory "reform." The paper also discusses the impact of a proposal — the Istook amendment — to silence the advocacy voice of the nonprofit sector, ironically at a time when that sector's voice is needed most. In each of these instances, the President's actions are examined.

Regardless of whether you support or oppose the President's actions on these matters, an interesting pattern has emerged with regard to protection of civil rights. In nearly all of the issues covered by this paper, the "fix" for the civil rights community has been an added sentence to a bill that exempts laws, regulations, and programs that enforce constitutional rights or statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.

While this exemption helps, it is not satisfactory. Although it ensures that federal protections remain for programs the prohibit discrimination (*e.g.,* the Fair Housing Act), the civil rights community is also dependent upon federal initiatives that go beyond protections against discrimination, such as programs that serve low-income and minority populations (*e.g.,* Medicaid). Without doubt, these behind-the-scenes laws and regulatory actions will have an increasingly major impact on the civil rights community. The formidable challenge will be to channel the impact into positive directions and outcomes.

I. Local Flexibility

A. Background

On the first day of the 104th Congress, Sen. Mark Hatfield (R-OR) introduced S. 88, the Local Empowerment and Flexibility Act. A similar bill was introduced at a later date in the House by Rep. Christopher Shays (R-CT).[1] The Local Flexibility bill would have established a cumbersome process that could have resulted in the undermining of many public protections — and all without much public input. The bill would have allowed states and localities to waive certain federal laws and regulations, transfer money from one program area to another, consolidate state plans, change eligibility to programs, and much more.

At first it appeared that most of the action on the bill would take place in the House. But at the last second, the bill was pulled from going to the floor for fear that the House Republicans would again be cast as "extremists." As a result, most of the action took place in the Senate, where Hatfield was a passionate supporter of his bill.

After repeated failed attempts by Hatfield to bring his bill to the floor on a "bipartisan" basis, he resorted to attaching S. 88 to an appropriations bill. When that appropriations bill had to be pulled, Hatfield set his sights on attaching S. 88 to the stop gap spending measure, called the Continuing Resolution. Ultimately, the bill was stripped from the CR and died in the 104th Congress.

Rep. Steny Hoyer (D-MD) and Sen. Carl Levin (D-MI) have indicated an interest in developing a bill for the 105th Congress that would promote local flexibility. As discussed below, the Clinton Administration has stated it strongly supports local flexibility. At the heart of the matter will be how local flexibility is defined.

Overview of the Local Flexibility Bill[2]

Under the bill, a state or local entity [government or a 501(c)(3) organization] could submit flexibility plans that would:

- *Consolidate funding under two or more programs.* There were no constraints on the ability to shift the use of funds. For example, an eligible applicant could have proposed the shifting of funds from a education program to serve disadvantaged children to the repair of roads. Or the eligible applicant, such as a state, could have commingled funds to create new block grants, merging several federal and state programs.

- *Consolidate state or local plans for program services.* For example, a state plan on developmental disabilities might have been merged with another plan addressing another issue, such as mental health needs. While the intent may have been to coordinate service delivery, those constituencies with less political clout might have lost key attention and services as a result. There would have been little opportunity to challenge the state or local action, except through a public hearing.

- *Change eligibility requirements under a program.* For example, age eligibility under Head Start could have been changed without virtually any public input beyond one hearing.

- *Waive law and regulation at any level of government.* The bill allowed the applicant to propose waivers if they were "necessary" to implement the flexibility plan. Unlike earlier versions of the bill, this one narrowed the types of federal waivers that could have been granted by agencies, but still had several key problems that resulted in little protection of public safeguards (see below). Under this bill, a city could have waived low-income targeting provisions under the Community Development Block Grant or changed the planning process used under the Comprehensive Housing Assistance Strategy.

The bill greatly undermined constitutional separation of powers by granting enormous powers to the executive branch to waive federal laws and change appropriations priorities without approval from Congress. Furthermore, the bill established a new superpower within the executive branch, called the Community Empowerment Board, that had no congressional oversight and little public accountability, yet had powers to approve and monitor flexibility plans, identify regulations of most federal financial assistance programs for "revision, repeal, and coordination," and develop uniform grant application forms and release forms to share information across eligible financial assistance programs.

How the Hatfield Bill Would Have Worked

The Hatfield bill permitted a state or locality to submit "flexibility plans" that affected any domestic assistance programs, including any grant, contract, or other form of assistance except a loan, that was made directly or indirectly to state, local, or tribal governments, or to charities covered under 501(c)(3) of the tax code that receive federally appropriated funds, or to a combination of such groups. It did not cover assistance programs to individuals (*e.g.,* education loans), benefits provided by the federal government directly to individuals, entitlement programs, Food Stamps, or other food voucher programs (*e.g.,* some WIC programs).

As discussed above, a federal interagency council, called a Community Empowerment Board (CEB) — comprised of federal departments, Federal Emergency Management Agency, Environmental Protection Agency, Small Business Administration, General Services Administration, Office on National Drug Control Policy, Office of Management and Budget, and other offices as directed by the President — would have been established to approve or disapprove flexibility plans submitted by eligible applicants. Despite the CEB's power to override congressional prerogatives and shape administrative decision making, there were no requirements that the CEB operate in the sunshine; in fact, actions taken by the CEB were not judicially reviewable.

Depending on the particular version of the Hatfield bill, the CEB was required to announce in the Federal Register the receipt of flexibility plans and make them available upon *written* request. The CEB was also granted the power to convene public hearings on flexibility plans. There was no requirement that the CEB actively obtain public comments. The model was similar to the Vice President's Council on Competitiveness during the Bush Administration that reviewed regulatory proposals from agencies.

In the final version — the bipartisan compromise — the number of flexibility plans was limited to a specific number. Furthermore, there would be only two opportunities to submit flexibility plans to the CEB, making it a pilot program.

Any state, local, or tribal government eligible for federal financial assistance or any charity that qualifies as a 501(c)(3) organization under the tax code, as well as a "qualified consortium" consisting of at least two or more of these entities receiving federally appropriated funds, could submit a flexibility plan to the CEB.

Before sending a flexibility plan to the CEB, the eligible applicant was required to submit it for comment to the governor, a state legislative official, or the chief executive officer of a local or tribal government if the entity was affected by the plan. If any of the governmental entities disapproved of the plan or did not intend to seek the appropriate state waiver of law or regulation, the eligible applicant was to acknowledge this in the plan submitted to the CEB. (If the governmental entity did not respond within 60 days, the applicant could then submit the plan to the CEB, but was required to indicate that it did not receive comments from the affected governmental entity.)

The eligible applicant was required to inform the affected community of the contents of the plan and give the public an opportunity to comment. The applicant was required to conduct at least one public hearing and submit a summary of the comments, as well as the applicant's response to "significant" comments, to the CEB.

What's In A Flexibility Plan

To be considered, eligible applicants were required to submit at least 18 items to the CEB. These items ranged from certification of reviews from state and local governments to descriptions of waivers to identification of geographic area served. Because the CEB had the authority to provide technical assistance to eligible applicants, these plans were subject to revision even after being submitted to the CEB.

In most cases, the bill required the applicant to *describe* certain aspects rather than set a *standard*. For example, the flexibility plan required the applicant to identify the groups currently being served versus the groups that would have been served under the plan. The bill did not require the plan to ensure that at least the same groups be served, or that more people be served. In fact, it took no position. In this regard, the bill provided very few standards or criteria to guide the CEB in approving or disapproving the flexibility plan.

Even in the final version of the bill, when there was movement in the direction of requiring greater accountability, there were problems. For example, the bill required the applicant to develop specific goals and measurable performance criteria that demonstrated how the plan would have improved service delivery. Unfortunately, even in this case, there was no standard by which to measure improvement. Although the bill required the applicant to compare performance under the plan with performance under existing programs, the lack of criteria to measure performance made the overall requirement somewhat useless.

The flexibility plan also required applicants to describe how the "goals, purposes, and intent" of each financial assistance program would have been "more effectively" met at the state, local, or tribal level. However, because the wording was "goals, purposes, and intent," this requirement would not have applied to specific standards (*e.g.*, age eligibility under a program). Thus, the bill left open the possibility of massive change in the federal statutory and regulatory requirements. Without federal statutory and regulatory requirements as the benchmark for measurement, the public would have had no assurance of what the plan could have truly accomplished.

If a flexibility plan changed the "authority" of the charity under the federal financial assistance program, it was required to include a written consent from the affected charity. Without the required written certification, the CEB could not approve any part of the plan.

The bill did require the applicant to identify methods for collecting data to measure performance and evaluate the impact of the plan on the community. However, this raised two problems. First, there was no assurance that the local or state data collection methods would be consistent with national standards for data collection or that the data would be comparable with data collected in other communities that sought waivers. Thus, the waiver and consolidation process could have impaired the ability to draw comparable national data sets for evaluations and conclusions.

Second, while the approved applicant was required to submit annual reports describing activities and comparing achievements to the goals and performance criteria specified in the plan, there were no resources allocated for the CEB or agencies to review the data that was supposed to be collected and maintained by the state or local entity. (The bill allowed personnel to be "detailed" to the CEB and for interagency funding to occur, but no new money was earmarked for the CEB or agency work.) As a result, if a plan was approved it would have been difficult for the federal government to truly monitor its effectiveness, thus limiting enforceability of critical national standards and protections.

Waivers of Law and Regulation

The CEB did not have the authority to approve waivers that would have had the effect of preempting state or local laws. However, it had the authority to waive many federal laws and regulations.

Although the CEB was empowered to approve the flexibility plan, including any proposed waivers, the primary "affected" federal agency was required to establish a memorandum of understanding with the applicant. Thus, in effect, the federal agency was also required to approve of the waiver and to monitor the implementation of the flexibility plan. The bill was very murky about the respective roles and powers of the CEB and the affected federal agency — at times it referred to the "affected Federal agency" when discussing waivers and, at other times, the CEB.

There was a section of the bill that created restrictions of waiver authority. This section was critical to the public interest community because it would have limited the eligible applicant with respect to what could have waived. This section of the bill was the most controversial; each revision by Hatfield changed this section — and it was changing until the last moment that the bill died.

In the final version of the bill there was a helpful list of areas where waivers would not be granted. These included areas: (1) where waiver authority under another provision of law already existed (*e.g.*, some education programs; empowerment zones); (2) enforcing statutory or constitutional rights of individuals including the right to equal access and opportunity in education and housing; (3) enforcing statutory rights that prohibit discrimination; (4) protecting public health and safety, the environment, labor standards, or worker safety; (5) providing for a maintenance of effort, matching share, or prohibition on supplanting; (6) granting an individual a cause of action; and (7) where an applicant would like to shift program funding directly to individual beneficiaries. The intent of the last point was to prohibit school vouchers. As the bill moved to the floor, the last waiver was switched to a specific prohibition on use of federal funds for private school vouchers.

Unfortunately, the list did not include a number of critical areas. For example, flexibility plans could still propose waivers of parental participation and involvement, targeting of resources to low-income families, or how funds were to be used (*e.g.*, shift funds for education of disadvantaged children to religious worship or for building facilities). For that matter, the list of waiver restrictions did not mention compliance with laws and regulations dealing with fiscal controls, grants management, and audits.

There were other problems with the bill's language. For example, the restrictions on waivers did not define the general terms to be used. As a result, it was believed that certain worker rights (*e.g.*, collective bargaining) would not be protected under the term "labor standards."

Other Parts of the Bill

The CEB was given other responsibilities beyond reviewing flexibility plans and monitoring their implementation. It was given the power, along with the Director of the Office of Management and Budget, to coordinate and assist federal agencies in identifying regulations of eligible federal financial assistance programs for revision, repeal, or coordination. Special authority was granted to evaluate performance standards and to recommend to agencies changes they should make in establishing standards and criteria for measuring program success.

The power to identify regulations for elimination or revision is quite unique. Since the CEB had no resources allocated to it (other than detailing agency staff and resources), it was likely that a separate federal agency, such as the Office of Management and Budget, would have provided the staff work. During the Bush Administration, the Council on Competitiveness operated in a nearly identical manner, using OMB to staff its work. Like the Council on Competitiveness, the CEB had no requirements to make its activities accountable to the public.

Finally, the CEB was given various responsibilities for grants and contracts management. For example, the CEB was given the authority to work with the Director of the Office of Management and Budget to assist federal agencies to create a uniform application form for federal financial assistance. The CEB was also empowered to create a release form about program beneficiaries that could be shared with multiple organizations addressing the needs of the beneficiary (as long as it was consistent with confidentiality requirements).

The bill created a new role for the Advisory Commission on Intergovernmental Relations (ACIR). No later than January 1, 2005, ACIR was to prepare a report that described the extent to which the law improved the ability of state and local governments to "make more effective use of" two or more federal financial assistance programs included in a flexibility plan. Additionally, ACIR was to make recommendations "with respect to flexibility" for state and local governments.

This last provision generated much controversy in light of the ACIR's preliminary report issued under the Unfunded Mandates Reform Act (see below). That report created a firestorm of protest with recommendations that were perceived to be highly biased and based on little scientific evidence. In fact, ACIR's final report on federal mandates was rejected by the Commission Members on July 23, 1996. Thus, the bill's broad-based requirement would have allowed ACIR to continue proposing ideas that could have greatly undermined public protections.

A variety of other reports were also required by the bill, including reports from the CEB, OMB, the General Accounting Office, and from the applicant of an approved flexibility plan.

B. What's the Clinton Record?

In the first report of the National Performance Review[3], the Vice President devotes a chapter to "empower[ing] state and local government" and provides six recommendations. These include the consolidation of 55 categorical programs into broader flexible grants, increasing state and local flexibility in using the remaining categorical grants, and expanded agency powers to waive rules and regulations.[4] These provisions are strikingly similar to the Hatfield bill, which was introduced more than a year after the Vice President's report.

A year after Hatfield introduced his bill, the President stated in his Fiscal Year 1997 Budget, "[w]ith some key changes, the proposed Local Empowerment and Flexibility Act would give States and localities a chance to propose plans for better coordination of Federal, State, local, and nonprofit funds and services, and to request waivers from Federal laws and regulations that hinder a locality's ability to achieve results."[5] The Administration clarified some of the "key changes" that needed to be made in a letter to Hatfield on September 21, 1995, prior to publication of the budget.[6]

The Administration identified seven "essential changes" that had to be made to the Hatfield bill before it could support it. These changes dealt with the review process of local flexibility plans including protecting the delegated authority of agency heads, insuring that states as well as localities could submit flexibility plans, providing greater definition to the content of the flexibility plans, targeting flexibility plans to communities most in need, and providing additional exclusions from the bill for "certain important areas."

As the bill began moving through the House, Rep. Christopher Shays worked with Hatfield and others in developing a substitute, taking into account some of the Administration's concerns. The substitute was reported out of Shays' Subcommittee on Human Resources and Intergovernmental Relations and then sent to the Administration for its comments before mark-up at the full Committee on Government Reform and Oversight. The Office of Management and Budget Deputy Director for Management, John Koskinen, sent a letter to Rep. Shays[7], several days before the scheduled mark-up of the bill at the full Committee. Koskinen repeated the Administration's position "that this legislation could become a useful tool to promote greater efficiency and innovation in Federal grant-making programs." Koskinen, however, again raised some concerns about the bill.

The OMB Deputy Director said while he would need more time to evaluate a substitute version that Shays had offered in subcommittee, one problem could be identified immediately: the list of laws that were exempt from waivers was not broad enough. Koskinen gave some specific laws that needed to be exempt: "These would include, among others, laws that preserve the environment, protect workers, ensure the health and safety of Americans, and enforce the constitutional rights of disabled students under the Equal Protection Clause of the 14th Amendment of the Constitution and ensure the nondiscriminatory treatment of those students." He made it very clear that "the Administration cannot support legislation that would allow for the waiver of these vital statutes and the protections they provide."

A coalition of public interest organizations, Citizens for Sensible Safeguards, comprised of labor, environment, civil rights, human needs, education, disability, religious, and consumer groups, strongly opposed the bill. The coalition endorsed the concept of local flexibility but felt that the Hatfield bill did not meet the test. Accordingly, the coalition shared its views with the Administration, raising the potential problems generated by the bill.

One key problem, however, was that there was no single "point person" from the Administration on this issue or on the bill. As a result, the coalition and Congress received many points of view about the Hatfield bill as negotiations continued.

C. The Bill Raises Questions

Regardless of viewpoint, the Hatfield bill raises a number of critical questions that the civil rights community needs to address. It is very clear that some type of local flexibility legislation will ultimately be passed, just as it is clear that there is a general direction toward devolution. Thus, the challenge to the civil rights community and the broader nonprofit community is to shape the direction of devolution legislation. Some questions that need to be addressed follow.

- Will local flexibility increase the quality of services that are delivered? On the one hand, who best knows what types of services should be delivered than the local community? On the other hand, will there be greater opportunity to change program objectives to make the programs appear more successful? For example, could a community change a hypothetical federal requirement to have children at age X reading at the fifth grade level to be at least at the fourth grade level. More children will likely achieve the outcome, but will quality diminish as a result?
- Who gets served? Will vulnerable populations lose out, or will local flexibility give communities greater opportunities to target resources? It is quite possible that the answer to this will not be consistent throughout the United States. If so, what implications does that have? Will local flexibility raise new dynamics, with powerful constituencies getting services and those less powerful denied them? If so, what are the implications for local organizing?
- What about the long-term national data needs? The Hatfield bill requires localities to collect information in order to determine whether the plan meets its stated objectives. However, there is no assurance of data comparability from community to community. Thus, over a period of time, the ability to identify gaps in services within states or to discuss national trends may be lost. If there is a move toward devolution, how do we insure the statistical and administrative data infrastructure that allows a global look at social problems?
- Who provides services? As local control increases, there has been a corresponding increase in the privatization of social services. For example, under the welfare reform legislation, a number of private companies have bid for state contracts to provide services. What will this competition mean for the nonprofit sector and the delivery of services? Is there a key role the nonprofit community plays in enlivening our civil society, providing a public good even if market forces will not sustain an activity? Or should market forces dictate what services are provided based on whether a profit can be made? If the nonprofit community is pushed aside in the devolution process, what will happen in future years if the for-profit community decides to get out of the business because profit margins are not high enough? Will there be a nonprofit community to pick up the pieces?
- Finally, there is the question of the appropriateness of local control. Do we want a balkanized governmental structure with 50 state approaches? Or do we believe in the *United* States, an opportunity for common standards and benchmarks? Is there an appropriate balance between the two?

II. Charity Tax Credit

A. Background

A direction that supports local control raises a number of policy options. For example, one option which has received significant currency is a charity tax credit. Under this proposal, individuals would be allowed to give up to $500 to a local charity providing services to the poor and take a tax credit for the contribution.[8] To offset the lost federal revenue, antipoverty programs would receive less federal funding. Furthermore, to be eligible for the tax credit, contributions would have to go to charities that provide services to the poor and do not engage in advocacy.

This would have a significant impact on federal programs, according to Marvin Olasky, one of the key supporters of this approach, who states, "It means handing control of anti-poverty programs from [Health and Human Services Secretary] Donna Shalala to local citizens."[19] Yet, not all conservatives agree with the charity tax credit. For example, the Heritage Foundation has raised concerns that it would help to institutionalize the liberal-leaning welfare establishment.

Notwithstanding the Heritage Foundation's concerns, there are many other issues that such a proposal raises:

- Charities providing services to the poor with the best public relations efforts are likely to be the ones who receive the greatest amount of contributions. These will not necessarily be the ones providing the best services.
- Federal government programs are aimed at serving those most in need without regard to beliefs or background. The tax credit will put this principle in jeopardy, especially since the federal government will have fewer resources to spend on low-income programs.
- The proposal will have a profound impact on advocacy since those charities that engage in advocacy will not be eligible for the tax credit program. (One proposal actually limits involvement in any type of policy arena, including litigation.) Ironically, nonprofits of all types view advocacy as a key mission, whether it be client advocacy or policy advocacy. The tax credit program is thus a subtle attempt to engineer social welfare organization out of the advocacy business.
- The proposal diminishes the value of other types of nonprofit organizations, such as those providing services to minority populations or those that tackle major issues like environmental justice.
- It would create a significant new federal tax expenditure with virtually no national accountability. Policymakers would have no way of knowing where funding is going and whether additional gaps in services are developing.

B. What's the Clinton Record?

Supporters of the charity tax credit have argued that President Clinton should endorse the concept, particularly as he proposes changes to the recently enacted welfare reform. For his part, the President has stated that he would like to make changes to welfare reform, but has not provided particulars.

Several high ranking Administration officials spoke out in 1996 in opposition to the charity tax credit. But there has been no official position from the Administration regarding the proposal.

III. Mandates

A. Background

The issue of local control heated up immediately when the Republicans took control of the House in 1994. One of the first bills passed was the Unfunded Mandates Reform Act of 1995, which President Clinton signed on March 15, 1995. The bill had passed the House and Senate by overwhelming margins. Nonetheless, the bill eventually signed by the President was dramatically different from the original proposal advanced by the Republicans' "Contract with America."

Some of the key differences were:

- *The original "no money, no mandate" requirement was dropped.* Under the proposed bill, if the federal government did not provide complete funding for a federal requirement (*e.g.,* civil rights, worker protections, environmental safeguards), then the state or local government was not obligated to comply.
- *The final law only applies to prospective laws.* The proposed bill would have applied the "no money, no mandate" provision to all existing laws.
- *The final law has several important exclusions, including constitutional rights, rights that prohibit discrimination, and Social Security.* The Contract with America had no exclusions.

Nonetheless, the law has an enormous impact on civil rights. The law defines a mandate as legislation or regulations that:

- Creates an enforceable duty upon state, local, or tribal governments except (a) as a condition of federal assistance, or (b) when the entity voluntarily participates in the program; and

- Reduces or eliminates authorization of appropriations (not necessarily the actual appropriations) for programs without reducing the duty on state, local, or tribal governments by a corresponding amount (special reference is made to border control and provision of services to illegal aliens).

(This first part of the definition is also the definition for a private sector mandate, except that the impact is on the private sector, not governments.)

The law also defines a mandate as a revision to existing entitlement programs under which at least $500 million annually goes to state, local, or tribal governments, if the revision increases the stringency of conditions on the government, or:

- Places caps or reduces funding; and
- The state, local, or tribal government lacks the authority to amend their financial or programmatic responsibilities under the program.

Legislation and regulations that deal with the following are not covered by the Act:

- Enforcement of constitutional rights;
- Statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability;
- Social Security Old Age Survivors and Disability Insurance;
- Compliance with accounting and auditing procedures with respect to grants and other types of assistance;
- Emergency assistance or relief at the request of state, local, or tribal governments;
- National security or ratification or implementation of international treaties; and
- Emergency legislation as designated by the President and Congress.

While anti-discrimination laws are specifically exempted under the law[10], programs upon which low-income and minority populations depend are not necessarily exempt (*e.g.*, Medicaid). The law[11] sets up procedural mechanisms aimed at preventing Congress from passing additional unfunded mandates. Since January 1, 1996, the law has required the Congressional Budget Office to do an analysis of all bills that will cost state, local, and tribal governments $50 million or more or the private sector $100 million or more in compliance costs. (The thresholds are adjusted annually for inflation.) The CBO analysis is to include whether the mandate equals or exceeds the threshold for any of the first five years of the mandate, the total direct cost of compliance, and the amount of money a law needs to be increased in order to meet these costs.

House and Senate committees reporting out bills containing such mandates are required to show that CBO did the necessary analyses of cost. The committees are also to describe any mandates in the bill, including the direct costs of the mandate, a qualitative and, if practicable, quantitative assessment of costs and benefits from the mandate, and a statement about the competitive balance between the public and private sector. For mandates on state, local, or tribal governments (as opposed to the private sector), a statement about the need to increase the authorization of appropriations, what method would be used to increase the authorization of appropriations, and whether it is intended to fully fund them or not, is required.

For mandates on state, local, and tribal governments of more than $50 million, a point of order can be raised in the House or Senate if the authorizing committee does not show where the necessary authorizations of appropriations would come from (whether or not the programs are in that committee's jurisdiction) in order to offset the costs to the public sector. A point of order can also be raised if the committee does not provide a certification of the CBO review. A majority vote can override the points of order.

These mandate review procedures have largely been ignored or waived by Congress.

The ACIR Report

Probably most important to the civil rights community in terms of impact has been the part of the unfunded mandates law that requires the Advisory Commission on Intergovernmental Relations (ACIR) — a body comprised of federal, state, and local officials and appointed federal officials — to examine the role of federal mandates enacted prior to the new law to determine whether they meet certain "scientific" standards. ACIR is required to report its findings to Congress and the institutions as to which mandates should be eliminated or restructured.

The definition of "mandate" for the ACIR report is considerably broader than the definition used in other parts of the Act. ACIR considers a mandate to be any statute, regulation, or federal court ruling that imposes an enforceable duty upon state, local, or tribal governments. There are no limitations (*e.g.*, excepts as a condition of federal assistance) and no exceptions (*e.g.*, prohibition of discrimination). Thus, ACIR can consider laws and regulations that directly deal with discrimination and constitutional rights (*e.g.*, the Americans with Disabilities Act).

The law requires the ACIR to submit its final report to Congress and the President no later than three months after the preliminary report, as well as to hold public hearings on the preliminary report. ACIR's preliminary report was issued January 24, 1996, which would have made the final report due April 24, 1996, had a firestorm of protest not subsequently ensued.

The ACIR preliminary report examined 14 out of more than 200 laws and regulations called to its attention, and recommended that seven be repealed and seven be retained "with modifications." The report called for exempting state and local governments from having to comply with the following items:

- Fair Labor Standards Act
- Family and Medical Leave Act
- Occupational Safety and Health Act
- Boren Amendment to Medicaid
- Drug and Alcohol Testing of Commercial Drivers
- Metric Conversion for Plans and Specifications
- Required Use of Recycled Rubber in road (already repealed)

The report also called for retaining the following seven laws with "modification":

- Americans with Disabilities Act: "Either provide increase federal funding ... or modify some deadlines and requirements."
- Individuals with Disabilities Education Act: "Either increase federal funding to the 40 percent authorized level or relieve states from the prescriptive and costly administrative mandates."
- Davis-Bacon Related Acts: "[A]pply Davis-Bacon provisions only in projects with total dollar cost in excess of $1 million and in which the federal grant funding for the project exceeded 505% of the total project costs."
- Clean Water Act: "[E]ither a return to substantial federal sharing in the costs of clean-up, or a relaxation of inflexible standards and deadlines."
- Safe Drinking Water: "[R]epeal some of the most onerous provisions, including mandatory additional tests for contaminants."
- Endangered Species Act: [E]xemptions to ESA should be applied more extensively to minimize social and economic impacts."
- Clean Air Act: "Permit states to develop their own ways of meeting federal air quality standards, and eliminate financial aid penalties if states are making good faith efforts to comply."

After a firestorm of protest, the ACIR produced a second draft on July 9, 1996. The July 9 draft demonstrated that the ACIR staff lost nearly all objectivity in researching and writing a final report. Furthermore, the ACIR was criticized for not meeting the statutory requirements of the Unfunded Mandates Reform Act of 1995 (P.L. 104-4) with respect to addressing certain subjects [Sec. 302(a)(3)] or holding more than one hearing on the preliminary report [Sec. 302(c)(2)]. Although the Act requires ACIR to "investigate and review the role of Federal mandates in intergovernmental relations and their impact on State, local, tribal, and Federal government objectives and responsibilities, . . . and consider views of and the impact on working men and women on those same matters," the July 9 report did not address the views of working men and women.

The final report dropped the recommendation dealing with ADA, but retained most of the other recommendations affecting the civil rights community. In fact, in some respects the final draft went further in undermining public protections. For example, the final report recommended a review of "additional existing Federal mandates," and further study of "laws authorizing private right-of-action against state and local governments." Among the mandates that ACIR wanted to review included the National Voter Registration Act ("Motor Voter"), Medicaid, and job training. Motor Voter, for example, has been subjected to court review and has been upheld. Although Congress has an appropriate means for reviewing these laws and will debate them in the public eye when up they are up for reauthorization, ACIR nevertheless proposed additional study of the "mandate."

The final report also called for a study to be commissioned to examine issues raised by laws authorizing private rights-of-action. The private right-of-action is the only way individuals can enforce their rights under the law. Rights that are not enforceable are meaningless. Accordingly, we strongly oppose the report's recommendation that there should be a moratorium on new laws and reauthorization of existing laws that grant private rights-of-action against state and local governments until this study be completed. Such recommendations have an impact on a wide range of laws, including the Americans with Disabilities Act and most entitlement programs.

In a stunning move, the final report was rejected by the ACIR Commissioners on July 23, 1996 in a 13-7 vote. It is believed to be the only ACIR staff report ever rejected by the Commissioners. Nonetheless, the ACIR has pushed, under the Local Flexibility bill described above, for a requirement that mandates ACIR to assess local flexibility plans and recommendations for giving greater flexibility — a plan strikingly similar to the failed attempt under the Unfunded Mandates Act.

B. What's the Clinton Record?

President Clinton strongly supported the Unfunded Mandates Reform Act and worked with governors and mayors to see it gain passage in Congress. However, the Administration also worked closely with the Senate to reshape the bill away from the onerous Contract with America provisions. The final bill was very similar to one offered a year earlier by Senators Dirk Kempthorne (R-ID) and John Glenn (D-OH).[12]

The Clinton Administration, and, in particular, its three representatives on ACIR — Marcia Hale, the White House Director for Intergovernmental Affairs, Richard Riley, Secretary of the Department of Education, and Carol Browner, Administrator of EPA — worked actively to fix the ACIR report that was required by the new law. When it became clear that the report could not be fixed, the Administration worked to reject the report. Without the Administration's action, it is quite probable that the report would have passed.

On July 3, 1996, Hale wrote to ACIR Chairman William Winter, stating that the Administration "cannot support the current draft" that was to be considered at the July 23 meeting. Hale noted that "the report still fails to respond to the broad questions the Congress posed to ACIR about unfunded mandates, and instead recommends statutory changes without adequately considering the effect of those changes on citizens and the environment." Hale's letter was followed by a letter from Browner on July 5 and one from Riley on July 9 providing additional detail on why each would oppose the ACIR report.

IV. Regulatory Reform

A. Background

In addition to the above initiatives, a number of proposals have moved through Congress to "reform" the regulatory process. Of all the initiatives only two became law: the Congressional Review Act and the Small Business Regulatory Enforcement Fairness Act (SBREFA).

Under the Congressional Review Act, all regulations will now be subject to review by Congress. An agency is required to send to Congress and the General Accounting Office (GAO) a report containing the final rule and all supporting materials. GAO has 15 days to provide Congress with an assessment of whether the agency has properly followed all regulatory procedures, including those called for under the Unfunded Mandates Reform Act, the Regulatory Flexibility

Act, and the President's regulatory review executive order (E.O. 12866), which requires cost-benefit analysis.

Congress then has 60 legislative days — not calendar days — to review the rule, during which time major rules cannot be implemented. Congress can pass a joint resolution of disapproval, thereby rejecting the agency rule. The President may veto the joint resolution of disapproval as he may other forms of legislation.

The new law has yet to be tested, although a number of regulations dealing with labor and environmental concerns are likely to be first on the list in the 105th Congress. The new law looms dangerously for the civil rights community. Any regulation, from housing enforcement to disability rights, will be subjected to this process. At the least, major regulations, such as modification to the regulations implementing the Americans with Disabilities Act or Motor Voter, can be slowed up until Congress has had 60 legislative days to review it. At the worst, it can be rejected. In such a case, the rule cannot take effect or be reissued "in substantially the same form."

SBREFA could also have a major impact on the civil rights community. Some key components of the new law include:

- Procedures giving small businesses special privileges to review agency proposed rules before the public has reviewed them;
- Creation of new powers at the Small Business Administration to review agency regulations, including establishment of Small Business Regulatory Fairness Boards. The Fairness Boards will be comprised of representatives from small businesses and will relay small business concerns and instances of excessive regulatory enforcement to SBA. The Boards are specifically allowed to accept donations to conduct their work, including donations from regulated entities.
- Modifications to the Regulatory Flexibility Act to allow small businesses to sue agencies and tie up proposed regulations in court;
- Amendments to the Equal Access to Justice Act that require agencies to pay the legal fees of firms who challenge "excessive" agency enforcement actions. The law requires agencies to reimburse small entities for fees and expenses incurred during an administrative or civil adjudication arising from agency enforcement actions. If the enforcement action is found to be "substantially in excess of the decision of the adjudicative officer and ... unreasonable when compared to such decision," then the affected business can seek reimbursement for litigation expenses. The result is that agencies will need to be wary of enforcement actions since they might be challenged in court and cost the agency if the penalty is reduced by the court.

This law has yet to be tested as it was passed in March 1996.[13] Nonetheless, the civil rights community needs to be aware as agency regulations are pursued. If an agency modifies regulations dealing with implementation of the Americans with Disabilities Act, for example, then small businesses may have an unfair advantage in reviewing and influencing the agency's proposed actions.

B. What's the Clinton Record?

Consistent with the President's belief in smaller, more efficient government, the Administration has pursued a number of regulatory reform efforts through its reinventing government initiative. Many of these efforts have resulted in agency actions to promote self-enforcement, concentrating agency resources on serious problems.[14]

The Clinton Administration supported the Congressional Review Act and SBREFA after negotiating minor changes in each bill.

V. Silencing the Advocacy Voice of Charities

A. Background

If ever there was a time for the nonprofit community to be more actively engaged in public policy matters, it is now. Nonprofit organizations give voice to millions of Americans; often they provide a means for low-income and minority populations to speak directly to government at the local, state, and federal levels; at other times, these organizations speak for those without the resources or ability to speak for themselves. Nonprofit organizations have a rich history of partnership with government in the delivery of services and public protections — and would have significant contributions on these tough devolution issues.

So it is with particular irony that during 1995 and 1996, a number of proposals from Reps. Ernest Istook (R-OK), David McIntosh (R-IN), and Robert Erhlich (R-MD) were floated to limit the advocacy voice of the nonprofit sector. The core elements of these proposals included:

- A very broad definition of advocacy that covered many traditional activities of nonprofit organizations, such as speaking out on public policy matters, writing letters to the editor, and participating in events intended to influence the public rulemaking process.
- Placing unreasonable limitations on advocacy free speech as a condition of receiving federal grants. The proposals only applied to federal grants, not federal contracts.
- Limitations on associating with those organizations that do engage in advocacy. These limits meant you could not set up a separate organization to receive federal grants if another "associated" entity engaged in advocacy. It also meant that federal grantees, primarily nonprofit organizations, would have new recordkeeping requirements imposed in order for the government to obtain information about who they work with that spends more than a specified threshold on advocacy.
- A structure for attack and intimidation of nonprofit organizations that advocate on behalf of the people they serve. Information about advocacy expenditures would be posted on the Internet. Such information, along with other disclosure requirements, could be used by bounty hunters to sue nonprofit organizations for alleged violations of the law. It would be the nonprofit organization's responsibility to prove with clear and convincing evidence that it did not violate the law.

Collectively dubbed the "Istook amendment" after the lead co-sponsor, these proposals were widely opposed by a large cross-section of the nonprofit sector, including the civil rights community.[15] Some felt that the origins of the Istook amendment can be traced to a "defund the left" campaign led by conservatives who believe the liberal-leaning organizations are "feeding at the government trough," as McIntosh put it, and are using government funds to pay for lobbying activities.

Despite these claims, there has been no evidence of any pattern of abuses found by the General Accounting Offices, the Office of Management and Budget, or any Inspector General office. Where a misuse of federal funds occurred, the nonprofit organization was properly penalized under existing law and regulations. Thus, the Istook amendment, many believed, was a solution in search of a problem.

Ultimately, the Istook amendment failed when the sponsors tried to attach the amendment to a series of spending bills. At one point, the amendment was nearly the cause for another government shutdown when an omnibus stop-gap spending bill was held up because the House refused to drop the Istook amendment. Eventually, the House agreed to drop the amendment and President Clinton signed the stop-gap measure.

Istook, McIntosh, and other proponents have repeatedly stated that they intend to put forward new proposals in the 105th Congress to end what they call "Washington's dirty little secret — welfare for lobbyists." While we can only speculate on what they will propose, several possibilities seem to be emerging:

- *Another attack on federal grantees.* Istook has said that he will try to attach some type of language as an amendment to other bills. In all probability, it will not look exactly like the original Istook proposal, but we can expect many of the above principles to be included once again.
- *An attack on grant-making federal agencies.* McIntosh has announced that he intends to hold hearings on the grant-making process, but has not provided many details. McIntosh chairs the Subcommittee on National Economic Growth, Natural

Resources and Regulatory Affairs, which launched the first round of attacks on nonprofit organizations. Some speculate that the hearings will springboard legislation to curtail agencies from giving various types of grants, such as training grants, because they lead to advocacy by organizations and citizens.

- *An attack on specific organizations.* Over the last 18 months, several organizations have been targeted because of their advocacy and opposition to the Istook amendment, including the National Council of Senior Citizens, AARP, YMCA, Alliance for Justice, and OMB Watch. Other organizations have also been attacked, and requested to supply all federal grant information for the last 10 years including all subgrant information. This form of harassment may continue.
- *An attack on the Combined Federal Campaign.* Rep. John Mica (R-FL), through his Subcommittee on Civil Service, has been contemplating for some time changes to the CFC, which allows federal workers to make donations to charities. His changes would restrict eligibility for groups that engage in a specified amount of advocacy activities.
- *An examination of who qualifies as a charity.* Rep. Nancy Johnson (R-CT), chair of the Oversight Subcommittee of the Ways and Means Committee, will be holding hearings about eligibility for tax-exempt status as a 501(c)(3) organization. She has raised the idea of limiting 501(c)(3) status to those organizations providing service delivery as opposed to education and advocacy.[16]
- *State level initiatives to restrict advocacy.* In Illinois, a proposal similar to the Istook amendment has been introduced, but will not be considered because during this short session only appropriations and emergency bills will be considered. In Washington, a bill was introduced to restrict lobbying by people who work for the state government. After a series of discussions, the bill's author agreed that it should focus solely on state employees, not organizations that receive grants and contracts. In Minnesota, threat of litigation and hardball politics is being waged to stop state contracts with nonprofits for advocacy on smoking control initiatives.

B. What's the Clinton Record?

The Clinton Administration worked actively to defeat the Istook amendment. In Statements of Administration Policy dealing with various spending bills, the Office of Management and Budget indicated it would recommend a presidential veto if the Istook amendment was not removed. Furthermore, the amendment was a major point of discussion between the Administration and conferees on spending bills. Without active support from the President it is uncertain whether the Istook amendment could have been defeated.

Furthermore, the Administration took steps during the President's first term to begin building a better relationship with the nonprofit sector. It regularly consulted with the sector on specific issues (*e.g.,* health care) and established Nonprofit Liaisons in every department and agency. The President also spoke to the importance of civil society initiatives in several speeches, but most importantly in his Georgetown University address in April 1995.

VI. General Recommendations to the Clinton Administration

The President emphatically supports local flexibility and reducing burdensome red tape. This means in all likelihood that there will be additional devolution efforts in the second term of the Clinton Administration, whether generated by Congress or the Administration. This is likely to go beyond past procedures of granting states and localities a number of waivers to federal regulations.

We could expect additional proposals to consolidate categorical programs, efforts to modify regulations so as to depend more heavily on self-enforcement, and initiatives to give greater powers to states and localities. While the civil rights community may be able to support many of these ideas in concept, the details of such plans may be less acceptable. As always, the devil is in the details. Thus, these devolution efforts will likely create additional tension between the Clinton Administration and the civil rights community.

The following are a few suggestions the Clinton Administration may want to adopt in order to reduce the tension. Devolution, itself, is neither inherently good or bad; its execution is what may be problematic. The challenge is to develop specific proposals that help advance the work of the civil rights community and simultaneously make sense in today's political and social environment.

Local Flexibility

- *The Clinton Administration should evaluate existing local flexibility efforts before supporting any new initiatives.* The Administration has supported a number of laws that allow the executive branch to grant program and regulatory waivers — and the Administration has granted hundreds of such waivers to states and localities. The Administration also supported the Educational Flexibility (Ed-Flex) Partnership Demonstration Program, which was established by the Goals 2000: Educate America Act, and allows up to six states the authority to waive certain federal statutory and regulatory requirements affecting state and local school districts and schools.[17] The Administration has implemented its Empowerment Communities/ Enterprise Zones, granting many waivers to federal requirements.

Despite the range of experience the Administration has had with granting waivers to increase local flexibility, there has been no evaluation of them. A more careful analysis of what impact these waivers have had must be undertaken in order to identify appropriate next steps.

- *The Clinton Administration should establish a dialogue with the civil rights and broader nonprofit sector around the impact of local flexibility and how it might best be structured to benefit service delivery.* Nearly all discussion of local flexibility and devolution has been between the Administration and state and local governments, not with the civil rights or broader nonprofit community. There is reason to believe that strengthened collaboration between the federal government and these other affected communities will minimize some of the negative consequences of devolution and bring greater benefit. The philanthropic sector has recognized the importance of these devolution issues and is investing in this area (*e.g.,* the W.K. Kellogg Foundation, the Northwest Area Foundation, and other foundations have already made significant grant commitments to monitor devolution.)

Simply put, many states and localities are working to minimize what they may view as the intrusive authority of the federal government to shape and control domestic programs. Thus, partnerships with the nonprofit and philanthropic sector offer an additional opportunity for collaboration to define and collect uniform data, develop and maintain national standards, promote best practices, and provide continuing, substantive, and programmatically focused national leadership.

If the Administration were to establish a dialogue with the civil rights and broader nonprofit sector, such an effort could address, both generally and in the context of particular departments, the following issues: (a) definitions of local flexibility (*e.g.,* how much flexibility can occur — transfers of money and how much; who gets to decide on the local plans); (b) how to insure protections of federal standards; (c) how to create performance standards where none exist; (d) how to streamline the federal assistance process (federal and state); and (e) how to ensure the safety of the federal statistical infrastructure as well as insure that there is adequate programmatic data for national policy analysis.

- *The Clinton Administration should not support any initiative beyond a pilot.* There is so much uncertainty in proposals such as the Hatfield Local Empowerment and Flexibility Act, that the Administration should be cautious in its endorsement of any effort until it has been tested and evaluated.

Charity Tax Credit

- *The Clinton Administration should oppose the charity tax credit.*
- *The Clinton Administration should look at new ways of increasing contributions to the civil rights and nonprofit community in general.* The role of charities is critical to a healthy civil society, and the role of the civil rights community is a critical component of the broader charitable sector. The President should encourage three types of activities: (a) initiatives to elevate the importance of the nonprofit community; (b) reinstituting the non-itemizer deduction for charitable contributions; and (c) exploration of new ways to generate additional revenue for charities.

Mandates

- *The Clinton Administration should oppose allowing the Advisory Commission on Intergovernmental Relations to conduct research on federal mandates.* The ACIR draft reports on federal mandates were extremely biased and did not reflect the views of the public interest community — even after a firestorm of protest.
- *To the extent that state and local governments are given special roles in reviewing agency regulations, the civil rights community (as well as other affected parties) should be given similar privileges.* President Clinton's Executive Order 12875, "Enhancing the Intergovernmental Partnership,"[18] as well as the Unfunded Mandates Reform Act, would have us believe that state and local governments should be treated differently than other regulated entities. Of course, there are times when the federal government should work in partnership with state and local governments in designing and implementing initiatives, such as information data collection efforts or service integration activities. However, state and local governments are also employers, polluters, and potentially have enormous impact on low-income and minority populations. They are no different than any other regulated entity in this respect. Providing preferential treatment to state and local governments unfairly tilts the regulatory playing field.
- *The Clinton Administration should expand the dialogue on local flexibility (see above) to include discussion of federal mandates.*

Regulatory "Reform"

- *The Clinton Administration should evaluate changes made during the last Congress before supporting any additional changes to the regulatory process.* The Congressional Review Act and the Small Business Regulatory Enforcement Fairness Act will likely significantly change the way regulations are reviewed. The two laws need to be evaluated. The Administration should oppose additional regulatory "reform" initiatives until such evaluation is completed.
- *The Clinton Administration should involve other affected parties beyond small businesses in review of regulations.* SBREFA requires participation of representatives of small businesses in the creation of Fairness Boards. Currently, this requirement is interpreted to mean that owners/management of small business should serve as representatives. However, the Administration could also appoint employees of small businesses as representatives. Secondly, the Administration should pursue a modification of the law to also include representatives of the community to participate in these Fairness Boards.
- *The Clinton Administration needs to keep an ongoing dialogue with the public interest community and the civil rights community about the impact of any regulatory reinventing efforts.* The principle that state and local governments should not receive special privileges regarding the rulemaking process should also be applied to businesses.

Attack on the Advocacy Voice of the Nonprofit Sector

- *The Clinton Administration should continue its opposition to the Istook amendment and related legislative proposals.*
- *The Clinton Administration should use the power of the presidential pulpit to promote the value of the nonprofit sector, the importance of civil society, and the beneficial role nonprofit advocacy plays to today's world.*

Endnotes

[1] H.R. 2086, introduced July 20, 1995.

[2] This is based on the bill as introduced. The bill that died in the 104th Congress looked different than the bill that was introduced. Major changes that affect the civil rights community, such as certain exemptions, are described.

[3] *Creating A Government That Works Better & Costs Less,* Report of the National Performance Review, Vice President Al Gore, September 7, 1993.

[4] *Ibid. See* pages 38-40.

[5] *The Budget of the United States: Fiscal Year 1997,* page 132.

[6] *See* letter of September 21, 1996 from Vice President Al Gore to Senator Mark Hatfield.

[7] *See* letter of March 14, 1996 from John A. Koskinen to Christopher Shays.

[8] This proposal was advanced in the Senate by Dan Coats (R-IN) and in the House by John Kasich (R- OH). A less ambitious charity tax credit was also proposed by Reps. J.C. Watts (R-OK) and James Talent (R-MO).

[9] *The Wall Street Journal,* "GOP Hopes Antipoverty Plans Appear Compassionate," September 24, 1996, page A24.

[10] As described below, not all portions of the law exempt anti-discrimination laws.

[11] There are four parts to the Unfunded Mandates Reform Act. The first title addresses congressional changes relating to passage of laws; the second title creates new requirements for the executive branch in issuing regulations; the third title establishes a role for the Advisory Commission on Intergovernmental Relations (ACIR) in conducting a review of federal mandates; and the fourth title prescribes judicial review of regulations. The first three parts of the law can have a significant impact on the civil rights community. However, there have been specific examples that have come to the attention of this author. The third part of the law, dealing with ACIR, did have a major impact and is discussed in this paper.

[12] This was discussed in Chapter V, "An Unseen Attack on Civil Rights: The Anti-Regulatory Agenda in the Contract with America," in *New Challenges,* Citizens' Commission on Civil Rights, 1995.

[13] It was passed as P.L. 104-121.

[14] An example of this approach was described in *The New York Times,* December 17, 1996 (Page A1), "U.S. Seeks to Limit Inspections' Scope At Nursing Homes." The proposed regulatory changes would narrow the scope of nursing home reviews, including interviews of residents and number of medical records reviewed. According to the article, "[i]nspectors would focus on 'areas of concern' identified in advance, rather than conducting 'comprehensive reviews,' and they would have fewer opportunities to observe the dispensing of medications." As could be expected, consumer groups denounced the proposal.

[15] A coalition, led by the Alliance for Justice, Independent Sector, and OMB Watch, moved effectively to thwart these Istook proposals. The coalition, called Let America Speak, includes more than 500 national organizations and thousands of community groups from across the country. The coalition has released several reports, distributes information via e-mail, and has a World Wide Web page (the URL is http://rtk.net/las).

[16] "Congresswoman Plans 'Very In-Depth' Hearings on Non-Profit Groups," *The Chronicle of Philanthropy,* October 17, 1996, page 30.

[17] Between February, 1995 and March, 1996, six states — Kansas, Massachusetts, Ohio, Oregon, Texas, and Vermont — were granted status as "Ed-Flex" States. An example of a waiver granted to the Fort Worth, Texas School District allowed it to target an extra portion of its Title I dollars to four high-poverty, inner-city elementary schools. The schools were chosen for a complete overhaul due to low achievement and other factors. The law provides specific information about what can and cannot be waived.

[18] The Executive Order was signed by President Clinton on October 26, 1993. The Order prohibits agencies, to the extent feasible and permitted by law, from implementing regulations that create mandates on state and local governments unless there are funds to pay for the direct costs incurred by the state or locality, or the agency meets with the affected governmental unit and has justification for issuing the regulation.

This parallels the Unfunded Mandates Reform Act, which requires federal agencies to consult with state, local, and tribal governments and the private sector about a rulemaking that contains an unfunded mandate before the general public knows about the rule. For significant regulatory actions that results in a mandate with a $100 million annual impact (adjusted annually for inflation), the agency must:

- Do a qualitative and quantitative assessment of costs and benefits of the mandate. The assessment is to include an assessment of available federal resources to pay for the mandate;
- Estimate, if reasonably feasible, the future compliance costs, and any disproportionate budgetary effects on regions of the country or segments of the private sector;
- Estimate the effect on the national economy of the mandate; and
- Describe the extent of the agency's consultation with state, local, and tribal governments, along with a summary of their comments and the agency's evaluation of those comments.

Except where inconsistent with law or where the agency head publishes a reason with the final rule, the agency must consider a reasonable number of regulatory alternatives to the mandate and select the "least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule" for state, local, and tribal governments (or the private sector). Special provisions are included for small government flexibility and consultation.

Chapter V

Judicial Nominations and Confirmations During the Second Half of the First Clinton Administration

by Elliot M. Mincberg

Introduction

In some respects, the course of judicial nominations and confirmations during the second half of the first Clinton Administration (1995-96) appears to resemble what happened during the first two years. As during the first two years, more than 60% of the Administration's judicial nominees were rated as "well-qualified" by the American Bar Association. Compared with experience under the Reagan–Bush Administrations, there continued to be significant diversity in judicial nominations as well, including the appointment of the first Japanese American federal appellate judge in history.[1] Actual contested votes on nominees on the Senate floor were virtually nonexistent.

A closer look, however, reveals a number of differences during the second two years. The percentage of minorities nominated by the President dropped somewhat during this period, and some observers noted that there appeared to be fewer individual nominees with outstanding public interest and civil rights records; indeed, the Administration withdrew or failed to nominate several individuals with distinguished backgrounds in these areas, and delayed or failed to submit nominations for a number of important judgeships. The performance of the Senate raised particularly significant concerns during this period. Especially as the 1996 elections approached, the judicial nominations process became increasingly politicized which led to substantial delays and no action whatsoever on a large number of nominees, including a large number of female and minority candidates. In fact, 1996 was the first election year in some 40 years in which not a single federal court of appeals nominee was confirmed, and the total number of judges confirmed during 1996 was the lowest during any election year going back to at least 1976.[2] Attacks on judicial independence helped lead to the resignation of one federal judge and brought criticism from Chief Justice Rehnquist, and as of October 1996, there were more federal appellate court vacancies than at the beginning of the 104th Congress' second session.[3] Although most observers hope and expect that these problems will not continue into 1997, the future remains uncertain.

This paper will review the record of the Clinton Administration and the Senate in nominating and confirming judges for the federal bench during 1995-96. First, it describes the procedures used to select and process candidates, including a comparison with the first two years of the Administration. Second, it analyzes the record of President Clinton in making nominations and the Senate in processing and confirming them, including such factors as quality, experience, diversity, and ideology. Finally, the paper will discuss the outlook for judicial nominations over the next several years during the second Clinton Administration, including suggestions for helping promote excellence, diversity, and commitment to equal justice in the federal judiciary.

I. Procedures for Nominating and Processing Federal Judgeship Candidates in 1995-96

Following the 1994 elections, when Republicans assumed control of the Senate, procedures for nominating and processing judicial nominees changed in several respects. From the perspective of the Administration, a number of the Democratic officeholders who had provided input on nominees, particularly for the lower courts, no longer held office. This required additional sources of such input to be identified. At the same time, additional consultation with Republican officeholders took place, and the machinery for processing nominations in the Senate changed party hands. The result was that while the overall process remained much the same, additional delay arose, which was significantly compounded as the 1996 elections approached.

A. Criteria for Selection

The overall criteria utilized by the Clinton Administration for selecting judges has remained relatively constant throughout the Administration's first term. President Clinton has continued to express his interest in increasing diversity on the federal bench, particularly in light of the extremely low number of women and minorities appointed by Presidents Reagan and Bush. He has also stated that he seeks to appoint as judges "men and women of unquestioned intellect, judicial temperament, broad experience, and a demonstrated concern for, and commitment to, the individual rights protected by our Constitution, including the right to privacy."[4] During the second half of the Administration, however, an additional criterion appears to have been added, at least implicitly: a desire to avoid significant controversy over judgeships. As one Administration official candidly admitted, "[w]e've steered clear of a few people who might have been fabulous judges but who would have provoked a fight that we were likely to lose."[5]

B. Overall Method of Selection

The general method used by the Administration to select nominees has remained similar throughout its first term. At the district court level, the Administration has primarily followed the historical practice of "senatorial courtesy." Under this procedure, the senior Democratic senator from the state with a judicial vacancy recommends between one and three candidates for the position. Occasionally, two Democratic Senators from a state (and in New York, a Republican and a Democratic Senator) will divide up responsibility for suggesting nominees in an agreed-upon fashion. Where there is no Democratic Senator, the recommendation is made by the ranking Democrat in the state's House delegation, the Governor, the Representative from the specific area, or another official selected in consultation with the White House. The Justice Department and the White House screen candidates, and the President makes the final selection.

As during the first part of the Clinton Administration and during previous Republican administrations, the White House reserves a larger role in finding and selecting nominees to the federal courts of appeal. A significant role is played by the Office of Counsel at the White House. A variety of sources provide input, including Senators and other officeholders, and again the President makes the final selection after screening takes place. There have been no Supreme Court vacancies during 1995-96, but it appears that the procedure for such selections has not changed.[6]

Even more than during the first part of the Clinton Administration, the White House has consulted Senate Judiciary Committee chairman Orrin Hatch as well as other Republican Senators prior to submitting nominations. This represented a noticeable change from the practice under President Bush when the Republican Party controlled the Presidency and the Democrats controlled the Senate. At that time, the Democratic-controlled Senate Judiciary Committee informally ended the practice under which a nominee's home-state senator could indefinitely delay or "blue-slip" a nominee. In at least some instances, however, the "blue-slip" procedure was effectively restored for Republican Senators. For example, the nomination to the Fourth Circuit of Charles Becton, an African American attorney with extensive experience, was reportedly delayed and then abandoned altogether when his conservative home-state senators from North Carolina refused to endorse him.[7]

C. Investigations and Interviews

1. The Justice Department and the White House

Although some of the names have changed, the basic procedures for the extensive process of investigating and interviewing candidates for the federal bench have not been altered significantly during the second half of the Clinton Administration. As before, both the Justice Department and the White House play important roles, with the activity at Justice centered in the Office of Policy Development, headed by Assistant Attorney General Eleanor D. Acheson. The focal point for judicial nominations activity at the White House remains in the Office of Counsel, where the leading role was played by Victoria Radd and then by Peter Erichsen, a deputy in Acheson's office. Erichsen retained his role at Justice as well, bringing even greater coordination between the two offices. As before, the Attorney General, White House Counsel, and other Administration officials participate in the process.

2. The American Bar Association

During the latter half of the first Clinton Administration, the American Bar Association's Standing Committee on the Federal Judiciary has continued in its traditional role of evaluating the qualifications of nominees for the federal bench. Problems concerning the slowness of ABA evaluations, which occurred early in the Administration, appear to have eased. But led by then-Presidential candidate Robert Dole, conservatives mounted a significant rhetorical attack on the ABA in 1996, claiming that because the ABA as an organization takes substantive positions on legislation with which conservatives often disagree, its unique role in evaluating nominees should be ended. The ABA and its defenders responded at a Senate Judiciary Committee hearing and elsewhere, pointing out that the work of the Standing Committee is completely separate and insulated from the ABA's lobbying work, that the two have nothing to do with each other, and that the ABA's role remains crucial.[8] This issue appeared to recede in importance during the summer and fall of the Presidential election year without any specific action having been taken, and at least at present, it appears that the ABA's role in judicial nominations will continue. Some observers have contended that previous criticism of the ABA during the Reagan–Bush Administrations muted the ABA's voice, and it remains to be seen what effect, if any, the more recent criticism will have.[9]

3. The Senate Judiciary Committee

The Senate Judiciary Committee helps the Senate play an independent "advice and consent" role on judicial nominations by investigating, holding hearings, and voting in committee on nominees. Beginning in 1995, the Committee was chaired by Republican Senator Orrin Hatch. Observers have noted two significant respects in which Committee action during this period has varied compared not only to the first two years of the Clinton Administration but also to previous practice under Democratic Senator Joseph Biden during Republican administrations. First, unlike the practice in prior years, Senator Hatch and other Republican Senators have sometimes submitted questions to lower court nominees about their personal views on sensitive political issues, such as affirmative action and support of or opposition to prior judicial nominees.[10] In addition, the processing of judicial nominations slowed substantially during 1996. In contrast to 1995, when more than 55 judges were confirmed, and in contrast to the 66 judges confirmed in election year 1992, only 17 judges were confirmed by the Senate in 1996. The Senate Judiciary Committee held only five hearings on judicial nominations during the entire year, with only three prior to June, leaving 29 prospective judges whose nominations never reached the Senate floor, many of whom never received a hearing in the Committee.[11] As discussed below, observers have explained that the result has damaged the administration of justice and has particularly harmed female and minority nominees.

II. The Record on Judicial Nominations During the Second Half of the Clinton Administration

During 1995 and 1996, President Clinton made 76 nominations to the federal bench which were voted upon and approved by the Senate. Several additional nominees were withdrawn, and 29 nominations were made and not acted upon by the Senate, a much higher percentage than during the first half of the Administration.[12] Although progress continued to be made in improving the diversity, quality, and commitment to equal rights of judicial nominees compared to the situation in the Reagan–Bush Administrations, observers reported serious problems concerning judicial nominations during this period.

A. The Overall Record

Retired Judge Leon Higginbotham has written that a diverse federal judiciary is important in order to ensure that all litigants "benefit from the experience of those whose backgrounds reflect the breadth of the American experience," as well as to help ensure that the bench is "both substantively excellent and respected by the general population."[13] In this key area, progress has clearly been made under President Clinton. Out of some 570 judges nominated by Presidents Reagan and Bush, less than 4% were African American and less than 8% were minority. In sharp contrast, some 18% of President Clinton's nominees have been African American and more than 27% have been minority, including the first Japanese American judge nominated for the federal courts of appeals. Diversity has declined somewhat during the last two years, however; for example, more than one-fifth of President Clinton's nominees were African American during 1993-94 (21.8%), while only about 12% were African American during 1995-96.[14]

President Clinton has also made significant progress with respect to gender diversity, which has remained relatively constant over the four years of his first term. Just over 31% of his judicial nominees have been women. In four years, he has nominated more female judges than during the combined 12 years of the Reagan and Bush Administrations.

The President's nominees generally have demonstrated high quality, as measured by such factors as prior experience with the judicial system as a judge, prosecutor or public defender as well as ABA ratings. Sixty-five percent of all of President Clinton's nominees were rated as "well qualified" by the ABA , a higher percentage than under Presidents Bush (52%), Reagan (53%), or Carter (57%).[15]

Compared to 1993-94, fewer recent Clinton nominees appear to have extensive civil rights and public interest legal credentials. The Alliance for Justice noted, for example, that "none of 1995's appointments have extensive public interest experience."[16] A number nevertheless have distinguished records of helping provide legal assistance to the indigent. For instance, Judge Carlos Lucero now of the 10th Circuit was a founding member of the board of directors of Colorado Legal Services, and Judge Eldon Fallon received the ABA National Pro Bono Award for his work in establishing and promoting a state-wide pro bono program in Louisiana.

Particularly during 1996, Senator Dole and others repeatedly attacked President Clinton for nominating "liberal" judges, especially on criminal justice issues. Available facts, however, appear to refute these claims. In 1996, University of Houston professor Robert Carp and his colleagues reported the results of a comparative study of some 36,500 judicial decisions since the Nixon Administration. On the basis of his study, Carp has categorized Senator Dole's claim as "a bunch of nonsense." One of the other co-authors has characterized Clinton's appointees as "decidedly less liberal than [those of] other modern Democratic presidents" and as most resembling the appointees of President Ford. Although the study concluded that President Clinton's appointments were somewhat more "liberal" with respect to civil rights than in areas such as criminal law, most pre-election year complaints about the President's nominees have come from progressives, who believe that his nominees have been too moderate in light of the conservative Reagan–Bush appointees who preceded them. If anything, this concern has increased during 1996.[17]

As a result of delays in the judicial nominations and confirmations process, particularly in the Senate during 1996, a significant number of vacancies and nominations were not acted upon.[28] Clinton nominees never reached the Senate floor. More than half of these nominees were women or minorities. As of October 1, 1996, no nominations had been made to fill an additional 35 vacancies, including 10 on the courts of appeal. Although most of these were of relatively recent origin, several qualified as "judicial emergencies," in which vacancies have existed for more than 18 months and, according to the Judicial Conference, produce an adverse effect on litigants and the administration of justice. More significantly, 17 of the vacancies continued by Senate inaction on Administration nominees are judicial emergencies, including some vacancies that have existed since 1990 and for which nominations had been pending for well over a year.[18] By November 1, the total number of judicial vacancies had increased to 69, with new openings occurring at a rate of about one per week.[19] In addition, Congress failed to act on the request of the Judicial Conference that more than 40 new judgeships be created because of workload concerns.[20]

B. Controversial Clinton Nominees

Despite the lack of high-profile Senate contests on particular nominees by President Clinton, specific controversies have occurred during the last several years. These have related to nominees withdrawn, nominations never made, nominees delayed, and attacks on sitting federal judges.

1. Nominees Withdrawn

In the immediate aftermath of the 1994 elections, several well-qualified 1993 district court nominees were not re-nominated, a fact widely attributed to concern by the White House that they would be opposed by Republican Senators and conservative interest groups. These included R. Samuel Paz, a California attorney who specializes in police abuse cases, and Judith McConnell, a California state court judge for more than 15 years who had been opposed by Religious Right groups because she had awarded custody of a 16-year-old boy to his father's male partner after his father's death, following the recommendations of social workers and the wishes of the boy himself. Conservative former California Appellate Judge Robert Thompson wrote after the withdrawal of the McConnell nomination that "the action attests that the Republican leadership is opposed to the judicial characteristics of impartiality, independence, and the courage to carry them out."[21]

President Clinton withdrew one nominee who appeared to present conservative legal and political credentials. The President had nominated corporate litigator Charles Stack, who had voted for Presidents Reagan and Bush, for the Court of Appeals for the 11th Circuit. There were few if any attacks on Stack as too "liberal," and in fact, progressives had raised concerns prior to his nomination. But Stack was severely criticized for his lack of judicial or appellate experience, his somewhat general answers to specific constitutional questions posed by the Senate Judiciary Committee, and the fact that he had raised $7 million for the President's election campaign in 1992. The nomination was specifically criticized by Senator Dole, conservative interest groups, and Florida Republicans on these grounds, and the nomination was withdrawn in May 1996.[22]

2. Nominations Not Made

During 1995-96, evidence has suggested that a number of potential nominations to the federal bench were not made at all due to concern by the Administration about possible opposition. The most prominent and public of these concerned Peter Edelman, a law professor at Georgetown University and a former counselor at the Department of HHS with a distinguished public service and public interest background. Shortly after the 1994 elections, conservatives publicly expressed opposition to the potential nomination of Edelman to the D.C. Circuit Court of Appeals as too "liberal." Criticism was particularly severe among progressives, however, when the President declined to nominate Edelman even for a district court seat, despite the fact that Senate Judiciary Committee chair Orrin Hatch reportedly had publicly signed off on such a nomination and had predicted that Edelman would be confirmed.[23]

3. Nominees Delayed

As discussed above, a number of nominations by the Clinton Administration were delayed and never voted upon by the Senate. This was particularly true with respect to the court of appeals where, for the first time in 40 years, not a single court of appeals judge was confirmed during an election year. Significant and widespread criticism of the Senate's performance resulted, including by Attorney General Reno and other top Justice Department officials and by Democratic Senators; 41 Senators signed a letter urging action in September, noting that then-Majority Leader Dole had stated in May that pending nominees should be brought up for a vote.[24]

Particular attention was focused on delays with respect to three appellate court nominees. James A. Beaty, Jr., an African American district court judge who had previously been supported by home-state Senator Jesse Helms, was nevertheless attacked as too "liberal" when nominated for the Fourth Circuit Court of Appeals, and no Senate action was taken on his nomination. Judge Beaty would be the first African American ever to serve on the Fourth Circuit. The D.C. Circuit nomination for which Peter Edelman had been rumored went to Justice Department official Merrick Garland. Although that nomination drew no challenges whatsoever based on ideology or qualifications, and although the Senate Judiciary Committee voted to approve the nomination, the full Senate took no action. This was apparently due to an objection by Senator Grassley of Iowa who claimed that one seat on the D.C. Circuit should first be eliminated as unnecessary, a move described by some as a "court-unpacking" plan. And action on prominent law professor William Fletcher's nomination to the Ninth Circuit continued to be delayed because of claims that his service on the court at the same time as his mother would violate a federal anti-nepotism statute, despite several previous prominent confirmations of close relatives on the same court and a comprehensive opinion from the Justice Department's Office of Legal Counsel that the law was inapplicable. According to a memo circulated among Republican Judiciary Committee staff, at least part of the purpose of this objection was apparently to "trigger the resignation of one of the Ninth Circuit's most activist members [Betty Fletcher]."[25]

4. Attacks on Sitting Judges

As discussed above, as part of the initial stages of the presidential campaign in 1996, Senator Dole and others launched severe attacks on a number of confirmed Clinton nominees as allegedly "soft on crime." Over a period of several months, Senator Dole and others identified Judge Harold Baer, H. Lee Sarokin, and a number of other individual judges as candidates for a judicial "Hall of Shame" and appeared to suggest that action be taken against them specifically because of their prior rulings. One comment by President Clinton's press secretary appeared to suggest that perhaps even the President thought that Judge Baer should resign if one of his rulings in a drug case was not altered, although White House Counsel Jack Quinn quickly clarified that this was not the case. Draft provisions proposed for the Republican Party platform suggested that the federal courts should be stripped of jurisdiction over selected subjects and that the Constitution should be amended to require periodic reconfirmation of federal judges and elimination of lifetime tenure.[26]

As discussed previously, attacks on Clinton judges as "soft on crime" were extremely questionable on their merits. But they clearly had a serious effect. Many observers severely criticized the implied if not express threat posed to judicial independence, a concept which Chief Justice Rehnquist characterized in an April 1996 speech as "one of the crown jewels of our system of government" which should not be changed by threatening judges with removal because of their rulings.[27] One of the judges singled out for attack, Judge Sarokin, resigned his post in June 1996, stating that as a result of the severe criticisms, he believed that his "tenure on the court has become so politicized that [he did] not feel that [he could] serve effectively."[28] The proposed Republican party platform provisions on judicial independence were not adopted, however, and partisan criticism of judges at the national level appeared to subside somewhat over the summer and fall of 1996.

III. The Outlook for the Future

What happens during the second Clinton Administration with respect to judicial nominations will clearly depend at least in part on political factors. Although a few conservative activists and others have tried to suggest that much of what happened in 1996 may continue, most believe that this will not take place because of the serious harm that would result to the administration of justice, the absence of a heated presidential election campaign until the year 2000, the fact that the issue had little apparent impact on the 1996 elections, the potential short-run threat to collegiality and effective operation of the Senate, and the longer-run threat that Democrats will retaliate in the future.[29] A growing number of vacancies already do and will continue to exist in the future; in fact, it has been estimated that over the eight years of his presidency, President Clinton will be called upon to submit nominations for 40-50% of the federal judiciary.[30]

As soon as possible after Congress reconvenes in 1997, President Clinton should resubmit the nominations that were not acted upon by the Senate in 1996. The Administration should also move promptly to submit nominations for the 40-plus other federal judicial vacancies. Efforts to promote diversity and to submit nominations which truly fulfill the President's pledge in 1992 to protect equality and constitutional rights should be redoubled. As experience has demonstrated, delay or attempts to submit only "non-controversial" nominees have often been unsuccessful and serve to encourage right-wing activists. In fact, the record during the first part of the Administration suggests that when the Administration stands firmly behind quality nominees with the aid of a strong Senate sponsor or supporter as well as home-state and other grassroots support, the result generally has been a good one.[31]

It is even more crucial that the Republican leadership in the Senate fulfill its responsibilities to process nominations fairly and expeditiously. The Clinton Administration has taken historic steps to depoliticize the process and consult with Senators on both sides of the aisle. For such conduct to continue, and for any future Republican President to receive the type of cooperation accorded in the 1980s, a return to the bipartisanship that has characterized the process is essential. The Senate should of course fully exercise its advice and consent function and should question or even oppose specific nominees where appropriate, but delay and unfair opposition should not take place. The Senate Judiciary Committee should promptly establish and maintain a schedule that will effectively respond to the growing problem of judicial vacancies and process nominees, and the full Senate should schedule votes accordingly. If all parties truly seek to fight crime and promote the administration of justice, a fully staffed, high-quality judiciary is critical as America moves toward the next century.

Endnotes

[1] The judge was A. Wallace Tashima, who was elevated from the District Court to the Ninth Circuit Court of Appeals. *See* Alliance for Justice Judicial Selection Project, *Annual Report 1995* (Feb. 6, 1996) ("Alliance 1995 Report") at 3.

[2] *See* M. Gordon, "Senate Balks at Clinton Judges" (*AP Report,* Oct. 3, 1996); Democratic Policy Committee, *Shutdown on Judges* (Oct. 7, 1996) ("DPC Report") at 1; Letter from Sen. Herb Kohl and 40 other Senators to Sens. Trent Lott and Thomas Daschle (Sept. 16, 1996).

[3] *See* discussion, *infra.*

[4] *See* ABA Journal (Oct. 1992) at 57.

[5] *See Gest,* "Disorder in the Courts?" (*US. News & World Report,* Feb. 12, 1996) at 40 ("Gest").

[6] *See* E. Mincberg, *The Clinton Record on Judicial Nominations at Mid-Term,* in Citizens' Commission on Civil Rights, *New Challenges: The Civil Rights Record of the Clinton Administration Mid-term* (1995) ("CCCR 1995") at 81.

[7] *See* Alliance 1995 Report at 3.

[8] *See, e.g., Legal Times* (April 22, 1996) at 19; People For the American Way, *Clear and Present Danger: The New Far Right Judicial Litmus Test* (Aug. 1996) ("PFAW Report") at 7.

[9] *See* CCCR 1995 at 82.

[10] *See* Alliance 1995 Report at 10; Written questions for all nominees from Sen. Spencer Abraham (Feb. 1995).

[11] *See* DPC Report; Alliance for Justice, *Election Year Gridlock Prevents Appointment of Federal Judges* (June 3, 1996); White House and Senate Judiciary Committee nominations statistics. The total of 29 judges not voted upon by the Senate includes one nominee to the Court of Claims.

[12] *See* CCCR 1995 at 83; White House, *Clinton Administration Judicial Record* (Oct. 3, 1996).

[13] L. Higginbotham, "The Case of the Missing Black Judges" (*New York Times,* July 29, 1992) at A21.

[14] These and similar numbers in this chapter were derived from White House reports on judicial nominations dated Oct. 3, 1996 and Oct. 8, 1994, as well as from the Alliance 1995 Report. Similarly, the percentage of all minority judicial nominees dropped from just over 31% in 1993-94 to just under 21% in 1995-96.

[15] *See* Oct. 3, 1996 White House Report. According to White House statistics, the percentage during 1995-96 actually increased slightly, since the percentage during 1993-94 was 63%. 1995 CCCR Report at 83.

[16] *See* Alliance 1995 Report at 4.

[17] *See* PFAW 1996 Report at 13, 10-12. *See also, e.g.,* J. Rosen, "Bench Marked" (*New Republic,* May 27, 1996) at 12-13 ("Rosen").

[18] In addition to the sources cited above, these statistics are derived from the Oct. 1, 1996 report on vacancies in the federal judiciary of the Administrative Office of the U.S. Courts.

[19] *See Washington Post* (Nov. 13, 1996 at A22).

[20] *See* Administrative Office of the U.S. Courts, *The Third Branch* (Nov. 1996 at 3). Specifically, the Judicial Conference had asked that Congress create 18 new permanent and 25 new "temporary" judgeships, and that five temporary judgeships be made permanent.

[21] *See* Alliance 1995 Report at 10-11. *See also* Gest at 40; *San Diego Union Tribune* (Jan. 22, 1995) at B-1.

[22] *See* W. Lester, *Judicial Politics* (AP Report, April 29, 1996); E. Schmitt, "Court Nominee Steps Down in Gain for Dole" (*New York Times,* May 10, 1996).

[23] *See* Alliance 1995 Report at 11; "Strict Scrutiny" (*Wall Street Journal,* Nov. 30, 1996); *Legal Times* (Sept. 4, 1995 at 3).

[24] *See* DPC Report at 1-3; M. Gordon, "Senate Balks at Clinton Judges" (*AP Report*, Oct. 3, 1996): M. Sniffen, "Reno Chides Senate on Judges" (*AP Report*, June 27, 1996).

[25] *See* 1995 Alliance Report at 11, 13; *Legal Times* (Dec. 4, 1995 at 6); *Legal Times* (April 15, 1996) at 19; *Legal Times* (Nov. 11, 1996) at 6.

[26] *See* PFAW Report at 8, 10; Rosen at 12-13; A. Mitchell, "Clinton Pressing Judge for Reversal in New York Drug Case" (*New York Times*, March 22, 1996).

[27] *See* PFAW Report at 8; *Congressional Record* (April 19, 1996) at S3725-27 (statement of Sen. Leahy); L. Greenhouse, "Judges as Political Issues" (*New York Times*, March 23, 1996); Rosen at 12-13.

[28] *New York Times* (June 5, 1996) at B1, B4.

[29] *See Washington Post* (Nov. 13, 1996 at A22); *Legal Times* (Nov. 11, 1996 at 6). Renewed grounds for pessimism were offered by a November, 1996 speech by Senator Hatch in which he announced his intention to "stand firm" against what he called "liberal activists who will make mincemeat of our Constitution and laws." *Legal Times* (Nov. 18, 1996 at 14).

[30] *See Washington Post* (Nov. 19, 1996 at A19).

[31] *See* CCCR 1995 at 87.

Chapter VI

The Performance of the U.S. Commission on Civil Rights

by Michael J. Kelleher

Introduction

The United States Commission on Civil Rights (the "Commission") is an independent, bipartisan, fact-finding agency of the Executive Branch, first established by Congress under the Civil Rights Act of 1957. Congress re-established the Commission under the Civil Rights Act of 1983.

Under its statutory mandate, the Commission is chartered to: (1) investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices; (2) study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution; (3) appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws; (4) serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws; and (5) submit reports, findings, and recommendations to the President and Congress. With the enactment of the Civil Rights Commission Amendments Act of 1994, the Commission acquired new authority to prepare public service announcements and advertising campaigns to discourage discrimination and denials of equal protection of the laws under the Constitution.[1]

The Commission does not advocate, litigate, mediate, or enforce laws. According to the statement of Chairperson Mary Frances Berry before the Subcommittee on the Constitution of the Senate's Committee on the Judiciary, "Our agency has just one central mission: to investigate the status of civil rights and civil rights enforcement and to inform the President, the Congress and the public of our findings and recommendations."[2] Unlike private organizations, the Commission possesses special investigative powers, including the power to hold hearings and issue subpoenas for the production of documents and the attendance of witnesses at such hearings. Since the Commission lacks enforcement powers that would enable it to apply specific remedies in individual cases, it refers complaints to the appropriate federal, state, or local government agency or private organization for action.[3] The Commission also maintains State Advisory Committees ("SACs") in each state and the District of Columbia to monitor civil rights issues on the state level.

I. Brief History

The Commission played an active role in the 1960s and 1970s in shaping America's civil rights agenda. Both policymakers and courts relied on and cited to Commission reports and recommendations.[4] However, the Reagan Administration effectively emasculated the Commission with its appointments; the Commission was accused of mismanagement, spending irregularities, and inaction due in large part to the polarizing effect of the Reagan appointees. Rather than dissolving the Commission, Congress and the Bush Administration attempted to give the agency an opportunity to restore its image and justify its existence. In November 1991, Representative Brooks summarized the Commission's second reauthorization for the next three years by warning the Commission that if it failed to perform its mandate, it should be prepared to cease operations after 1994.[5]

The Commission's record during President Clinton's first term unfortunately mirrored the Reagan era in many aspects. Despite receiving short reauthorization periods since the Bush Administration, the Commission has failed in many ways to prevent reconsideration of its mission. Besides an internal review, the Commission's overall performance over the past two years necessitates a careful examination of its appropriations, structure, processes, and viability by the 105th Congress and the President.

II. Commission During the Clinton Administration Since 1995

A. Commissioner and Staff Director Appointments

The Commission consists of eight Commissioners, each appointed to a six-year term, who serve on a part-time basis. The Commissioners hold monthly meetings, and convene several times a year to conduct hearings, conferences, consultations, and briefings. Of the eight Commissioners, no more than four Commissioners may be affiliated with any one political party. Four of the Commissioners are appointed by the President, while the President Pro Tempore of the Senate and the Speaker of the House each appoint two Commissioners. No Senate confirmation is required. The President also appoints the Commission's Chairperson, Vice-Chairperson, and Staff Director, with majority approval of the Commissioners.

Many of the Commissioners have changed since 1995. The terms of Commissioners Charles Pei Wang (Democrat), Arthur Fletcher (Republican), Carl Anderson (Republican), and Russell Redenbaugh (Independent) expired in December 1995. President Clinton appointed A. Leon Higginbotham, Jr., a Democrat, and Yvonne Y. Lee, a Democrat, who became Commissioners by December 1995.[6] On December 22, 1995, Russell G. Redenbaugh was reappointed to the Commission by the President Pro Tempore.[7] The Speaker of the House reappointed Carl A. Anderson to the Commission on February 1996. Thus, the eight-member Commission as of February 1996 consists of four Republican appointees and four Democratic appointees[8]; this division has fostered an environment of unproductive partisan politics for the agency.

Unlike the Commissioners, the Staff Director, who is responsible for overseeing the day-to-day activities of the Commission, staff, and State Advisory Committees, serves full-time. As stated previously, the President has statutory authority to appoint a Staff Director with majority consent of the Commissioners. Throughout the Clinton Administration, the appointment of a Staff Director has been a source of controversy. First, President Clinton appointed Stuart Ishimaru as "Acting Staff Director" in April 1994, despite threats by several Commissioners to turn down the appointment.[9] In response to the appointment, Commissioner Robert George filed suit in Federal district court alleging that he was denied the right to participate in the selection of the Commission's Staff Director by the President's unilateral appointment. After Judge Royce C. Lamberth upheld Commissioner George's challenge on April 6, 1994, President Clinton replaced Ishimaru with "interim" Staff Director Mary Matthews.

President Clinton has yet to permanently fill the Staff Director slot. Clinton's nominee of Nancy Chen, a former staffer for Senator Paul Simon, was deemed too partisan to win Commission approval.[10] In February 1996, President Clinton nominated Charles Pei Wang, whose term as Commissioner expired in 1995, for the Staff Director position. However, just days before the Commission voted to confirm Wang in March of 1996, legal and labor activists in New York's Chinese American community bombarded the Commission with letters citing the successful suit against Wang by 223 Chinese immigrant workers in Federal court for violating their civil and labor rights.[11] In addition, one NLRB hearing officer who heard Wang's case in 1991, found that Wang had lied in his testimony. After the controversy, Wang's nomination was effectively dropped by the Commission. Despite being viewed only as "temporary," Ms. Matthews will continue her open-ended role as Staff Director until the end of the 1996 calendar year, when she plans to step down.[12]

B. Commission Accomplishments

The overall output of the U.S. Commission for the last two years of the Clinton Administration — including the preparation and issuance of reports, studies and resolutions, the convening of forums and hearings, education of the public on civil rights, and efforts with its SACs — has been disappointing. While there have been some noticeable accomplishments, the Commission has clearly been hampered by problems with its procedure, structure, and goals, as well as by its partisan composition.

Since 1995, the Commission has issued public statements and resolutions: (1) urging Congress to consider abolishing federal personal and business income taxes in the District of Columbia to help poor, immigrant, and minority Washingtonians (April 1995); (2) urging the United States not to send a delegation to the United Nations World Conference on Women in Beijing if China restricted religious liberties of visitors, and urging participation be contingent on the release of Harry Wu (July 1995) (Wu was released from China on August 25, 1995 and religious liberties issues were resolved in days leading up to the International conference); (3) voting to send a letter to chairpersons of appropriate congressional committees urging them to schedule hearings on annual retreat and involvement by federal agents in the whites-only "good ole boys roundup" (July 1995); (4) commending Hillary Clinton for her speech at the U.N. Fourth World Conference on Women in Beijing, China (August 1995); and (5) urging Congress to pass the Church Arson Prevention Act (June 1996) (President Clinton signed the Church Burning Act into law on July 1996).[13]

The Commission also held briefings: (1) addressing California's Proposition 187 (a ballot initiative related to the denial of federal benefits to illegal immigrants) and immigration reform (December 1994); (2) examining efforts to end discrimination in mortgage lending (March 1995); (3) to discussing ways to improve communications about civil rights issues with SAC representatives (the first such meeting since 1992) (June 1995); (4) on police racism and sexism (October 1995); (5) on affirmative action (November 1995); and (6) on racial, ethnic, gender, and disability discrimination against consumers of goods and services, and the "three strikes, you're out" law enforcement policy (1996).[14]

By the end of 1996, the Commission expects to receive about 5,000 telephonic and written complaints from individuals alleging violations of their civil rights, approximately 1,000 more complaints than received in 1995. The U.S. Commission reviews and refers these complaints to appropriate government and private organizations for appropriate action.

In addition, the Commission has been very successful in maintaining an active program for disseminating information and educating the public. In the Fall of 1995, the Commission published its inaugural issue of *The Civil Rights Journal*, which is intended to serve as a regular forum for thought and debate on civil rights issues confronting the nation.[15] The first issue included articles on such diverse topics as hate group activity in America, immigration policies, and classifying racial groups in the year 2000 census. However, the Commission failed to publish an edition of the Journal in FY 1996.

With the enactment of Public Law 103-419, the Commission also produced and launched in FY 1996 its first civil rights public service announcement ("PSA") entitled "Discrimination Is Just Out Of Tune With America" featuring singer Mary Chapin Carpenter. The PSA, which was sent to and is being aired by several hundred radio stations across the country, advises the public of the Commission's toll free number on which they may register civil rights violations. According to Chairperson Berry, many citizens seeking the Commission's assistance with possible civil rights violations have indicated they learned of the Commission's complaint hotline through this PSA.[16] The Commission is also planning to produce and release a PSA in 1997 featuring actor and comedian Bill Cosby.[17]

Finally, the Commission launched its home page on the World Wide Web on August 29, 1996. The home page, located at http://www.usccr.gov, contains Commission information (such as duties, powers, and biographical facts of the Commissioners), a list of free publications available to the public, meeting calendars of the Commission and state advisory committees, news releases, and the Mary Chapin Carpenter PSA. More importantly, the site also offers instructions on sending a civil rights complaint to the Commission.

III. Controversies Involving the Commission

A. Report on Funding Federal Civil Rights Enforcement

The Commission has clearly been hampered by ensuing controversy over its national reports on civil rights.

In June of 1995, the Commission released a report entitled: *Funding Federal Civil Rights Enforcement* ("Funding Report"). The report analyzed the funding levels requested and appropriated for civil rights in six major civil rights agencies over the last 15 years. While the workload of enforcement agencies has more than doubled since 1981 (with the passage of new civil rights laws including the Civil Rights Restoration Act of 1987 and the Americans with Disabilities Act of 1990), funding has decreased. As Chairperson Berry stated at the press conference to release the Funding Report, "persons entitled to the protection of the federal government cannot be sure of receiving it, particularly on a timely basis."[18]

However, the report's findings were clearly secondary to the public controversy that erupted over its release. The Funding Report was released after a vote of 4-1 by the Commissioners participating in a Commission telephone poll; subsequently, four of the eight Commissioners contacted both the press and Congressman Charles Canady (R-Fl.), claiming the study was released in violation of normal voting procedures. Three of the four Republican appointees stated that, had they been given the opportunity to vote, the report would not have been issued without serious changes. Commissioners Carl Anderson, Robert George, and Russell Redenbaugh wrote to the Editor of The Washington Times that "it was ironic that the federal commission charged by law with investigating voting rights abuses should deny its own members a vote on an important report to Congress."[19] In addition, Commissioner Anderson protested that the vote should have been delayed while he was vacationing in Europe. Nonetheless, as Chairperson Berry pointed out, she once phoned in a vote on a report while in China."[20]

Staff Director Matthews, who was responsible for the report's poll voting, claimed that the poll was conducted in accordance with the standard Commission procedure as the Commissioners had agreed to conduct a telephonic poll at their June 1995 meeting. In addition, Ms. Matthews provided the Commissioners with five days advance notice of the date the poll was to be conducted. Thus, if the three non-voting Commissioners had wished to change the report, it would seem the five days notice for voting would have provided ample opportunity for comment. Moreover, on numerous occasions (more than 93) during the history of voting at the Commission, reports have been approved by fewer than the majority (but at least a quorum) of Commissioners. This poor voting record suggests a failure of the majority of the Commissioners to participate.[21] In the case of the Funding Report, their participation would have resulted in a 4-4 tie, requiring amendments to the report.

B. Racial and Ethnic Tensions Project

Since 1995, the Commission has continued to pursue its long-term project, entitled *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination* ("Ethnic Tensions Project"), undertaken in 1991 to study the deteriorating conditions of race and ethnic relations across America. As part of the Ethnic Tensions Project, the Commission, in August 1995, released a report of its findings and recommendations from months of field investigations, research, and a three-day fact-finding hearing in Chicago. Specifically, the report found that Chicago minorities encounter impediments to financial credit and technical assistance; residents live in segregated and deteriorated public housing; and minorities and the poor in general suffer from inadequate health care. According to the Commission, shortages of bilingual staff hamper both Chicago's social services as well as health agencies.

In addition to the Chicago Report, the Commission released in September of 1995 a report following up on hearings in Washington, D.C., which examined the Mount Pleasant riots, its underlying causes, hate incidents, and financial and banking industry practices.[22] The Commission also held hearings on the Ethnic Tensions Project in the following cities: New York City (July 1995: examining individuals and receiving documents subpoenaed from banking and securities industries which included testimony by Mayor Giuliani); Miami (Sept. 1995: examining issues relating to immigration, racial, and ethnic tensions); and Los Angeles (Sept. 1996: follow up examination to three-day hearing in 1993 to update information on law enforcement and community relations).[23] By the end of 1996, the Commission also plans to hold hearings in Miami (to examine immigration-related civil rights issues) and in the Mississippi Delta region (to examine the effects of state financing on public education, voting rights, and housing). In FY 1997, the Commission plans to release reports from the individual state hearings on the Ethnic Tensions Project; and a summary report (summarizing both common causes of racial and ethnic tensions and recommendations in the six cities examined).

However, the lengthy turnaround of reports, resulting in issuance well past Chairperson Berry's promises to Congress, has dampened the potential impact of the Commission's Racial and Ethnic Tensions Project. For example, the report on the Washington, D.C. hearings conducted in 1992 wasn't released until September 1996. Moreover, Chairperson Berry stated before the House Appropriations Subcommittee in April 1995 that the Commission would complete reports on the Miami and Mississippi Delta region hearings by the end of 1996.[24] However, Chair Berry at the time of this writing doesn't believe the Miami report will be issued in 1996 and has pushed back release of the Mississippi hearing report until 1997.[25] Chairperson Berry also promised to Congress in April 1995 to issue the summary report on the multi-year project by the end of 1996. This deadline also has been pushed back to FY 1997.[26] Such delay has damaged the Commission's reputation and called into question its continued viability.

C. Subpoena Power Backlash

The Commission has also received serious backlash from Congress and the public over its use of its subpoena power in preparation for its fact-finding hearing in Miami. In August 1995, the Commission subpoenaed Enos Schera, JoAnn Peart, and Rob Ross, members of local grassroots organizations interested in curbing illegal immigration by putting a referendum on the 1996 ballot in Florida to deny public benefits to undocumented immigrants. The three citizens complained to the press and to their respective congressional representatives that the Commission harassed them through intimidation and abuse of power. Ms. Peart wrote to Representative Mark Foley (R-Fl.) that she had received four phone calls in just one day from the same Commission official to be summoned to the Miami hearing.[27] As a result of the complaints, the Commission received a tremendous amount of negative press.[28]

Although the Commission eventually withdrew the three subpoenas after the public outcry, the House Subcommittee on the Constitution, chaired by Representative Charles Canady (R-Fl.), held a hearing in October 1995 to determine if the Commission had "chilled the first amendment-protected activities of individuals in connection with the Miami hearing."[29] At the hearing, Representative Foley compared the Commission's alleged abuse of subpoena power to "McCarthyism."[30] In her testimony in response, Staff Director Mary Matthews discussed the Commission's internal policy of issuing subpoenas at the Congressional hearing, a policy rooted in the agency's fact-finding and investigative authority.[31] Matthews noted that when creating the Commission, President Eisenhower had rejected the option of creating a Commission by executive order because it would lack authority to subpoena witnesses, power he deemed essential if the Commission "was to be in a position where it could get all of the facts on the table."[32] In addition, Matthews pointed out that the Supreme Court in 1960 (and in two other separate court rulings) held that the rules adopted by the Commission for the conduct of its hearings violate no constitutional right of any witness subpoenaed to testify at a Commission hearing. As Chair Berry pointed out to Congressman Canady in a September 18, 1995, statement, any witness may challenge a Commission subpoena in court, directly (seeking an injunction or order vacating the subpoena) or indirectly (not complying with a subpoena, forcing the Commission to seek enforcement in court).[33]

D. Federal Title VI Enforcement Report

In August of 1996, the Commission issued a detailed report entitled: *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs* ("Title VI Report"). The report contains an evaluation and analysis of the U.S. Department of Justice's enforcement efforts as well as the Title VI enforcement efforts of 10 federal agencies and 10 subagencies.[34] The Title VI Report found "extensive" and "glaring" deficiencies in Title VI enforcement by the agencies reviewed.[35] In addition, the Report pointed out that although Congress has shifted the administration of more federal assistance programs to the states, federal agencies have not responded in a manner to ensure that Title VI is enforced in state operations. The Department of Justice already has begun to implement many of the reforms recommended by the Title VI Report.[36]

In her statement before the Judiciary Subcommittee in July 1996, Chair Berry characterized the Title VI Report as one of the Commission's "major accomplishments" for FY 1995, although the report wasn't released until August 1996, eight months after the Commission's deadline to comply with its statutory mandate to issue at least one report every fiscal year that monitors federal civil rights enforcement efforts.[37] This delay appeared to be due to inadequate coordination between the Commissioners and the Staff Director.

The Commissioner's report for FY 1996 is a study of the Department of Education's efforts to enforce a variety of laws relating to the education offered to language-minority children, programs provided to children with disabilities, equal educational opportunity for girls, and the ability tracking of minority children. Study goals include determining whether each of the enforcement agencies has the staff, resources, and training to carry out its responsibilities. The Commissioners discussed this report in September of 1996 and passed it onto their staff assistants for changes. As of this writing, Chairperson Berry hopes this report is voted on at the Commission hearing in November of 1996.[38] Considering the Commission's history, such wishes may be optimistic at best.

IV. State Advisory Committees

The U.S. Commission funds six regional offices that support the SACs in conducting hearings and preparing reports. The SACs are composed of local volunteer officials, familiar with local and state civil rights issues, who serve without compensation. These officials assist the Commission with its fact-finding, investigative, and information dissemination functions. Individual members of the SACs term of office is two years, but they can be reappointed.[39]

While the Commission has been thwarted by administrative matters at the national level, during the last two years its work with the SACs has been quite productive. In the past, SAC reports were often held back from being issued because of Commissioner disputes on specific report provisions.[40] Since adopting as Commission policy in March 1994 the report of the SAC Process Task Force (chaired by Commissioner Redenbaugh), the Commission has greatly improved the SAC reporting process.[41] Under this new policy, reports must be revised and resubmitted to the Commissioners within two months. Further, Commission policy now requires a formal vote of SAC members on project adoption, generating more interest in the local SAC members.[42] In addition, if all procedural rules are followed and if the SAC has taken in a variety of points of view to compile their report, the Commission will accept and issue a SAC report. The Commission's acceptance, however, does not mean approval of its contents but rather affirms proper procedure was adhered to.[43] If the Commission wants to take a specific action regarding a finding or recommendation of a SAC report, the Commission must vote on it separately. As Commissioner Redenbaugh stated, the SACs can "still do their own content" (in their reports) but they are now "accountable" (to submit reports to Commissioners within two months).[44]

Since late 1994, State Advisory Committees have issued reports on the following topics: (1) campus tensions surrounding alleged bias at two Connecticut universities; (2) police protection of African Americans in Milwaukee, Wisconsin; (3) hate crime in Ohio; (4) equal opportunity in the West Virginian coal mining industry; (5) racism and insensitivity to minority cultures and school discipline in Michigan public schools; (6) the number of discrimination complaint investigations and percent of probable cause findings filed in St. Paul and Minneapolis, Minnesota; (7) the long-standing problems with Utah's Industrial Commission which examines workers' discrimination claims; (8) racial and ethnic tensions in Tennessee, primarily compiled from 1992 SAC meetings in three major cities in Tennessee; (9) affirmative action issues in Indiana, part of a larger report to be issued by the end of 1996 by six states' advisory committees; (10) enforcement of civil rights laws in Alaska; (11) minority student retention in public colleges in Colorado; (12) civil rights issues facing Asian Americans in metropolitan Chicago; (13) civil rights issues in Maine; (14) race relations in Nebraska; and (15) the employment of women in South Dakota.[45]

In addition to issuing reports, the state advisory committees, in concert with the U.S. Commission and Regional Offices, held a variety of hearings on civil rights issues. These hearings provided the opportunity for experts to present and summarize their position papers and for the public to speak out on particular issues. SAC hearings included the following: (1) a two-day hearing by the California Advisory Committee looking into employment practices at seven local television news operations (October 1994); (2) a Nevada SAC informational conference on fair-housing law in the Las Vegas and southern Nevada area (1995); (3) a consultation by the Wisconsin Advisory Committee discussing affirmative action (February 1996); (4) a hearing by Washington SAC to investigate the low level of minority employment in local government (March 1996); and (5) a consultation by the Ohio Advisory Committee to discuss affirmative action (April 1996).[46]

The critical importance of the state advisory committees is clearly demonstrated by the forums held in six southern states in July of 1996 addressing and examining the burning of African American and integrated churches. These hearings were conducted in Alabama (Boligee, 7/2/96), Louisiana (Baker, 7/8/96), Mississippi (Cleveland, 7/10 and 7/11), North Carolina (7/18/96), South Carolina (Columbia, 7/16/96) and Tennessee (Memphis, 7/10/96). The forums centered on the procedures followed by federal, state, and local law enforcement officials in conducting their investigations of church burnings. Several commissioners participated in the SAC forums, including Chairperson Berry, who attended each of the six forums. In October 1996, the Commission, together with its state advisory committees, issued a report on the Southern communities where churches were burned.[47] It found that despite testimony showing great strides in race relations in the South, lingering racism and the refusal of whites to open the doors of society to African Americans provided the impetus for the string of church burnings.[48]

The efforts of Florida's Advisory Committee underscores the importance of SAC efforts. In 1992 and 1993, the Florida SAC held six meetings to examine race relations. Meeting participants included community officials, university professors, representatives of various ethnic racial groups, and the mayors of five major cities in Florida (including St. Petersburg). The Advisory Committee's report, released in March 1996, warned of looming racial problems in the subject cities, stating, "It was indeed evident (from the Florida hearings) that police actions can be the spark that sets off a confrontation and that despite some efforts to address these problems, they are still paramount to concerns."[49] Clearly the Florida SAC's report portended the terrible riot in St. Petersburg on October 24, 1996, which stemmed from the death of an 18-year-old African American at the hands of a white police officer. The ensuing riots left one police officer shot, numerous cars and businesses destroyed, and 20 protesters arrested.[50] While the Florida SAC's report was not issued quickly enough after the hearings, its concept and integrity remain intact.

V. Appropriations/ Reauthorization

With the passage by Congress of Public Law 103-419 on October 25, 1994, the Commission was reauthorized for one year at a funding level of $9 million, an increase of $1.2 million over the FY 1994 appropriation.[51] More importantly, Public Law 103-419 rewrote the 1983 Civil Rights Commission Act to: reinstate the Commission's longstanding fact-finding duties by authorizing the Commission to use depositions and written interrogatories to obtain information and testimony about matters subject to Commission hearings or reports; and grant the Agency the authority to produce advertising and public service announcements. In addition, Public Law 103-419 forbade the creation of additional regional offices with the new appropriation.[52]

For FY 1996, the Commission sought a funding level of $11.4 million, an increase of $2.4 million over the FY 1995 appropriation.[53] Chairperson Berry explained the additional request would allow the Commission to pursue an expanded program to monitor and evaluate federal civil rights enforcement, including major investigations in the areas of employment, education, and Title II of the Americans with Disabilities Act.[54] The additional resources requested for FY 1996 would also permit the Commission to extend its fact-finding activities to include investigations of a number of critical civil rights issues, such as economic empowerment of minorities, women, and older persons, and financial assistance and equal opportunity in higher education. However, Congress signed the Commission's reauthorization for FY 1996 for one year at $8.75 million.

In July of 1996, the Commission requested a reauthorization for FY 1997 of $11.4 million for six years, an increase of $2.65 million over FY 1996.[55] The Commission claimed the additional authorization would permit it to engage in a broader range of investigations of key civil rights issues such as the crisis of African American males in America's inner cities, to expand the grassroots activities of state advisory committees, and to intensify education and outreach efforts through expansion of the Commission's National Clearinghouse Library.[56] Chairperson Berry also pleaded with Congress to leave "intact" the Commission's existing powers and jurisdiction, stating, "Any diminution of Agency's authority would seriously impair [the Commission's] ability to make significant contributions to shaping civil rights policies and law enforcement."[57]

While Chair Berry testified on July 24, 1996 that the Clinton Administration was in accord with its appropriation request for FY 1997, the Administration clearly sent out a mixed message at best with its FY 1997 budget. While the Administration supported the Commission's recommendation for a six year authorization, the Administration's budget showed two levels of funding recommendations for the Commission in FY 1997.[58] More specifically, the Administration's budget discussed a preferred "budget authority" of $11.4 million similar to the Commission's recommendation, but the official amount listed in the Administration's budget table reflected only a $9.3 million request in budget authority. Other than the statement in the Administration's budget that "the Administration's preferred funding level (for FY 1997 of $11.4 million) is believed necessary to adequately support the Commission's work," no other research has been found showing the Administration's backing of the Commission's appropriation for FY 1997.[59]

The Commission's authorization for FY 1996 expired on September 30, 1996.[60] While the 104th Congress did not formally reauthorize the Commission, the agency has continued operating through the time of this writing.[61] The Commission's reauthorization was part of an Omnibus spending bill which passed on September 28, 1996 and was signed by

President Clinton. The Commission's continued operation, despite the absence of a formal reauthorization, is based on an April 29, 1992 Opinion by the Comptroller General of the United States. The Comptroller General, in a similar but not identical situation, ruled that an agency may continue operating a program whose authorization has expired if an appropriation is made to the agency explicitly for the program by either an annual appropriation act or a continuing resolution.[62] Constitution Subcommittee Chairman Charles Canady conceded that the Commission should be authorized at its current level, $8.75 million, for one year, pending the completion of studies by the GAO and Office of Personnel Management evaluating its performance.[63]

VI. Commission Goals For FY 1997 And Beyond

With reauthorization virtually assured through September 1997, the Commission plans to emphasize certain areas of federal civil rights enforcement and civil rights developments in America's states, cities, and rural communities. To this end, the Commission's principal civil rights enforcement project for FY 1997 is an evaluation of the implementation and enforcement of Titles I and II of the Americans with Disabilities Act (ADA), which hasn't been subjected to a thorough review since its enactment in 1990. According to Chairperson Berry, the ADA Study will include interviews, document reviews, analysis of complaints data, and a two day public hearing.[64] As previously discussed, the Commission plans to complete the remaining hearings, individual state reports, and summary report on its multi-year Ethnic Tensions Project.

In addition to these planned reports, the Commission in FY 1997 will also hold public fact-finding hearings and conduct research on the following issues: the crisis of young African American males in the inner cities; whether the American education system has achieved the guarantee of religious freedom; environmental justice; and the application of the Voting Rights Act of 1965, as amended. Moreover, the Commission plans to use its resources to enhance the tracking of thousands of complaints referred by the Commission to other federal agencies. The Commission also will continue to produce PSAs designed to discourage discrimination. Recently, Chairperson Berry stated she would like the President to utilize the Commissioners in conjunction with the State Advisory Committees in responding immediately to any local civil rights crises, such as the recent riots in St. Petersburg, Florida.[65] In this way, both local concerns and Commission recommendations can be immediately addressed.

VII. Recommendations

A. The Commission

The Commission's record over the past two years suggests a problem with process and commitment more than substance. Problems include alleged voting irregularities, challenges to the Commission's subpoena power, inadequate coordination by the Commissioners and Staff Director, and an inability to issue timely reports. By failing to address each of these problems, the Commission will jeopardize its reauthorization and continued Congressional oversight.

The Commission has taken several administrative steps internally to correct some of these problems. First, to prevent voting "irregularities" in the future, the Commission in December of 1995 instituted a procedure whereby Commissioners can report their votes via facsimile.[66] However, as Chair Berry points out, one of the top responsibilities of the Commissioners is to be available to respond when queried on voting matters.[67] Despite their part-time service, the acting Commissioners must demonstrate to Congress, the President, and the public, their commitment to the activities of the Commission.

Second, the Commission's project focus and goals must be more clearly defined, not only so that its recommendations and analysis will be considered by policymakers, but also to fulfill its statutory mandate. For example, one might argue that issues of immigration, covered by the Commission in Miami as part of its multi-year project on racial tensions, was both outside the Commission's authority, and better left to the U.S. Commission on Immigration. To address this concern, the Commission in September of 1996 voted to reduce the number of multi-year projects, committing only to projects that may be completed in one year.[68] By limiting the Commission's goals, Chairperson Berry hopefully will be able to deliver on her promises to Congress.

The Commissioners and the eventual replacement for Staff Director Matthews must work toward the Commission's common goal of meeting its legislative mandate. The credibility of the Commission has clearly been hurt by Commissioners running to the press with reports of partisan actions. While discussions in the press of topical issues such as affirmative action are appropriate, statements on the Commission's alleged procedural snafus should be left to the Commission hearings. Moreover, the Staff Director must be more responsive to the Commissioners, or in the alternative, the Commission needs to implement policies to ensure the Staff Director is more accountable to them.

The Commission should also follow Chair Berry's goal to coordinate the Commission and SACs in responding immediately to civil rights crises such as the Southern church burnings and St. Petersburg riots. In this way, the American public could look to the U.S. Commission on Civil Rights when civil rights crises occur, as they look to the FEMA Agency when natural disasters occur.

Finally, the Commission should also continue to educate and raise America's awareness of civil rights issues and the various forms of discrimination. Sustained production and release of additional public service announcements could be as effective as the "Just Say No" campaigns in the 1980s. Moreover, the Commission should concentrate on updating and publicizing its home page more often (which as of November 1996 hadn't been updated since July 1996), especially in light of President Clinton's plan to connect the nation's schools to the Internet.

B. Congress

The greatest changes for the Commission may come from Congress. Although currently dormant, the Commission's reauthorization for FY 1997, as proposed, is tied to changes in its subpoena authority, and to the Staff Director's accountability to the Commissioners.

Despite Matthews' and Berry's assertions at the 1995 Congressional hearing, both the House and Senate have proposed changes in the way the Commission can issue subpoenas. Instead of requiring the Staff Director and Chairperson to issue subpoenas, without the participation of the other Commissioners, H.R. 3874 would require the eight member Commission to approve the issuance of subpoenas by majority vote. Due to procedural delays, the bill was not passed at the end of the 104th Congress' session. However, some changes to the Commission's subpoena power will likely be instituted.[69] While the alleged misuse of subpoena authority in the Commission's Miami hearing may have necessitated Congressional oversight, altering the Commission's subpoena authority is not the answer. The Commission's subpoena authority has only been challenged in court three times, with each court siding with the Commission. Moreover, there have been virtually no reports of abuse of the Commission's subpoena power over its history.[70] Due to its fact-finding and investigatory functions, the Commission's ability to issue subpoenas for attendance and testimony of witnesses or the production of documents, is critical to its ability to gather facts effectively. Finally, this proposed change is hardly practical; the Commissioners' part-time service would clearly prevent them from properly reviewing and approving potential subpoenas for Commission hearings and/or add to the detriment of more important responsibilities.

Congress also proposed legislation in the 104th Session which sought to allow a majority of the Commissioners to remove the Staff Director in order to provide "the incentive to work cooperatively with all members of the Commission."[71] Currently, the Staff Director may be removed only at the direction of the President. If the Commissioners cannot shed their historically partisan natures and focus on substance over procedure, the proposed change will be both divisive and counterproductive.

Congress should, however, change the appointment process of the Commission to protect its viability. According to Chairperson Berry, Congress needs to change the Commission structure which creates deadlocks on project goals and voting. Congress should move away from the system of political appointments without Senate consent. Instead, Congress should either return to the old system of presidential appointment of all Commissioners subject to Senate confirmation, and/or like the Supreme Court, have an uneven number of Commissioners with Senate confirmation.[72] Either system would allow civil rights groups to present their concerns over potential appointees. Moreover, either system would enable the President to create a body free of political distractions. Chairperson Berry also suggested a third alternative: Congress would appoint Commissioners, subject to Senate confirmation, to serve full-time and run the Agency.[73] Currently, the Commissioners' part-time status prevents them from dedicating a concentrated effort to the Agency's reports, understanding the Commission's system and procedure, and correcting its problems; consequently, Congress should carefully weigh each suggested appointment procedure.

Finally, Congress must objectively review the Commission's overall performance. Putting aside political considerations, Congress must either assist the Commission with the necessary structural and administrative changes or decide to not reauthorize the Commission in its present form.

C. President

In securing a second term, President Clinton can also play a key role in the Commission's resurgence. First, the President must speak out on behalf of the Commission's efforts. During his first term, President Clinton did not speak of the Commission's accomplishments or justify his recommended appropriation for FY 1997.[74] Moreover, President Clinton failed to share his plans for the Commission during the 1996 campaign, a perfect stage for promotion of the Commission.[75] President Clinton also failed to respond to the State Advisory Committees' resolution for a White House Conference on Civil Rights by June 1996 (in response to the church burnings). Clearly, the "bully pulpit" could serve as an effective tool in the way Americans (and Congress) view the Commission. The President's promotion of an awareness of the Commission's and State Advisory Committees' abilities to foretell and respond immediately to civil rights crises would likely encourage more of the nation's governors, political officials, and policymakers to participate in the Commission's forums and briefings. The President should also carefully consider his appointment to the Staff Director position. As the last two years have shown, the position will call for someone to rise above the partisan politics exhibited by the Commissioners and assist Congress in revamping the Commission's structure and policies.

Finally, the President's two budget recommendations for the Commission for FY 1997 indicate his lack of commitment to the agency. While Chairperson Berry insists the Administration is behind the Commission 100%, more involvement by President Clinton may help determine the Commission's viability in 1997. In August of 1994, President Clinton proclaimed to seek justice, opportunity, and empowerment for all Americans.[76] It's time he backed up that statement by participating in the Commission's restructuring and revitalization.

VIII. Conclusion

The country has been shaken recently by the burning of dozens of churches, the charges of widespread discrimination of African American employees at Texaco, and the riots in St. Petersburg, Florida. Political leaders, as exhibited in the 1996 Presidential campaign, seem to be failing to engage the nation in a discussion of the causes and possible solutions to civil rights abuses. Now more than ever, America needs an independent, bipartisan Commission that will report on federal civil rights enforcement efforts and analyze and promote solutions to various forms of discrimination. For the U.S. Commission on Civil Rights to serve beyond its 40th year, the Congress, President, and Commission need to make immediate structural and administrative changes. Despite its many recent controversies, the Commission made some impressive strides since 1995. Like Congress, we look forward to reviewing the recommendations of the GAO and OMB Reports on the Commission to determine whether this agency will continue to serve as an objective and credible voice on civil rights.[77]

Endnotes

[1] "Civil Rights Commission Amendments Act of 1994," Public Law 103-419.

[2] Statement of Mary Frances Berry, Chairperson of the U.S. Commission on Civil Rights, before the Subcommittee on the Constitution, Committee of the Judiciary of the Senate, July 24, 1996.

[3] U.S. Commission on Civil Rights, home page, http://www.usccr.gov., June 19, 1996.

[4] Anne Kornhauser, "The Silent 'Conscience'; Civil Rights Commission is Hardly in Evidence," *Legal Times,* July 1, 1991.

[5] 137 Cong. Rec. H9161 (November 5, 1991).

[6] Commissioner Higginbotham is a Public Service Professor of Jurisprudence at Harvard University, as well as Of Counsel to the law firm of Paul, Weiss, Rifkind, Wharton and Garrison. From 1977 until he retired in 1993, Mr. Higginbotham served as Circuit Judge and Chief Judge of the United States Court of Appeals for the Third Circuit. Commissioner Lee is head of Yvonne Lee Consultants, a San Francisco-based public relations company specializing in Asian community affairs. Ms. Lee served as National Executive Director of the Chinese American Citizens Alliance, the oldest Asian American civil rights organization, from 1989 to 1993.

[7] 141 Cong. Rec. S19286 (December 22, 1995).

[8] The remaining four commissioners currently serving are Mary Frances Berry (Independent, appointed by President Clinton as Chairperson on November 19, 1993), Cruz Reynoso (Democrat, appointed by President Clinton as Vice-chairperson on November 19, 1993), Robert George (Independent, appointed by President Bush, term expires in December 1998) and Constance Horner (Republican, appointed by President Bush, term expires in December 1998). Pamphlet of the Commissioners of the United States Commission on Civil Rights.

[9] "Restoring Rights at the Civil Rights Commission," *The Washington Times,* Part A, p. 18, April 11, 1994.

[10] A. Fuentes, "Civil Rights Wrong: Chinatown Activists Stop Clinton Nominee," *The Village Voice,* May 7, 1996.

[11] *Id.*

[12] Telephone Interview with Russell Redenbaugh, Commissioner of U.S. Commission on Civil Rights (November 8, 1996).

[13] "Rights Commission Favors End to D.C. Federal Tax," *PR Newswire Association, Inc.,* April 7, 1995; "Civil Rights Commission Proposes Conditions on Attendance of U.S. Delegation," *PR Newswire Assoc.,* Inc., July 17, 1995; "Civil Rights Commission wants Investigation of Any Law Enforcement Involved in Racist Event," *PR Newswire Assoc.,* July 18, 1995; "Commission Resolution on First Lady's Speech at U.N. Conference," *PR Newswire Assoc.,* August 17, 1995; "Statement by U.S. Commission on Burnings of African American Churches," *PR Newswire Assoc.,* June 14, 1996.

[14] "Civil Rights Commission Examines Immigration Reform and Proposition 187," *PR Newswire Assoc.,* December 14, 1994; "Civil Rights Commission Examines Access to Mortgage Lending," *PR Newswire Assoc.,* March 1, 1995; "Representatives of Civil Rights Advisory Panels Meet," *PR Newswire Assoc.,* June 15, 1995; Transcript of "All Things Considered," *National Public Radio,* October 7, 1995; "Commission to Hold Affirmative Action Hearing," *Jet,* November 5, 1995. *Supra* note 2.

[15] *Supra* note 2.

[16] *Id.*

[17] Telephone interview with Mary Matthews, Staff Director of the U.S. Commission on Civil Rights (November 25, 1996).

[18] As the report pointed out, the backlog at the Equal Opportunity Commission alone is 100,000 cases. Jennifer Corbett, "Budgets Take Bite out of Civil Rights," *The Austin American-Statesman,* June 4, 1995.

[19] Letter from Carl A. Anderson, Robert George, and Russell Redenbaugh, Commissioners of the U.S. Commission on Civil Rights to the Editor, *The Washington Times,* July 5, 1995.

[20] Telephone Interview with Mary Frances Berry, Chairperson of United States Commission on Civil Rights (November 12, 1996).

[21] *Id.*

[22] *Supra,* note 2.

[23] "Civil Rights Commission to Hold New York Hearing," *PR Newswire Assoc.,* July 20, 1995; "U.S. Commission on Civil Rights to Hold Hearing in Miami," *PR Newswire Assoc.,* September 6, 1995; "Rights Commission to Probe Law Enforcement and Community Relations in Los Angeles," *PR Newswire Assoc.,* September 6, 1996.

[24] Statement of Mary Frances Berry, Chairperson of U.S. Commission on Civil Rights, before the Subcommittee on Commerce, Justice, State, the Judiciary, and related agencies, Committee on Appropriations, U.S. House of Representatives, April 4, 1995.

[25] *Supra,* note 2 and 19.

[26] *Supra,* note 2.

[27] Statement of Mark Foley, House of Representatives, before the Hearing of the Subcommittee on the Constitution, Committee of the Judiciary of the House of Representatives, October 19, 1995.

[28] The Palm Beach Post Times said in a September 13, 1995 editorial: "[s]ay subpoena and ordinary people get nervous ... The U.S. Civil Rights Commission thinks of subpoenas as a matter of practice ... Maybe that's because the Federal agency is based in Washington, where my lawyer will call your lawyer passes as social intercourse."

[29] Charles T. Canady, House of Representatives, Transcript of Hearing of the Subcommittee on the Constitution, Committee of the Judiciary of the House of Representatives, October 19, 1995, p.1.

[30] Mark Foley, House of Representatives, Transcript of Hearing of the Subcommittee on the Constitution, Committee of the Judiciary of the House of Representatives, October 19, 1995, p. 9.

[31] The Commission may only issue subpoenas within the State in which the hearing is being held and within a 100-mile radius of the site. Moreover, it doesn't subpoena witnesses of one point of view. All witnesses, reluctant or voluntary receive a subpoena, after receiving a letter warning of the impending subpoena; and a follow up meeting with a commission representative to explain an individuals rights.

[32] Mary K. Matthews, Staff Director of U.S. Commission on Civil Rights, Statement before the Hearing of the Subcommittee on the Constitution, Committee of the Judiciary of the House of Representatives, October 19, 1995, p. 38-39.

[33] *Supra*, note 31 at p. 40.

[34] *Supra*, note 3.

[35] U.S. Commission on Civil Rights Press Release, August 21, 1996.

[36] *Id.*

[37] *Supra,* note 2.

[38] *Supra,* note 19.

[39] *Supra,* note 3.

[40] *Supra,* note 12 and 37.

[41] *Supra,* note 12.

[42] *Supra,* note 37.

[43] Minutes of March 4, 1995 Meeting of the U.S. Commission on Civil Rights.

[44] *Supra,* note 12.

[45] "Children Should Learn Early About Bias," *The Hartford Courant,* November 24, 1994; "U.S. Commission on Civil Rights to Release Report," *Financial News, PR Newswire Assoc.,* December 2, 1994; Brian Fisher, "Dayton Counts Fewest Hate Crimes; But Some Hint Victims Don't All Get Tallied," *The Dayton Daily News,* January

25, 1995; "Report Accuses Logan Police of Bias against Black State Citizens," *The Charleston Gazette,* September 27, 1995; "Michigan Advisory Committee to Hold Press Conference in Lansing," *PR Newswire Assoc.,* February 29, 1996; A. Lonetree, "St. Paul Human Rights Head Josephine Brown Quits Under Pressure," *Star Tribune,* July 31, 1996; Shawn Foster, "Report Blasts Industrial Commission," *The Salt Lake Tribune,* July 4, 1996; Quintin Robinson and Patti Patterson, "Tensions Firing up Before 1st Burning, says Panel," *The Commercial Appeal,* July 11, 1996; Susan Schramm, "Affirmative Action Office Doing Its Job, Study Says," *The Indianapolis Star,* September 25, 1996. *Supra,* note 2.

[46] Sam Lin, "Civil Rights Panel Probes Los Angeles Television Stations," *Asian Week,* October 28, 1994; "Wisconsin Advisory Committee to Hold Consultation Focusing on Affirmative Action," *PR Newswire Assoc.,* February 15, 1996; "Looking Back," *News Tribune,* p. A7, March 5, 1996; "Ohio Advisory Committee to Hold Consultation," *PR Newswire Assoc.,* April 25, 1996. *Supra,* note 2.

[47] Bonna M. Del A Cruz, "Hope Fades for Quick End to Arson Spree," *The Tennessean,* July 11, 1996. *Supra,* note 19.

[48] Jan Greenburg, "Report on Southern Church Fires Finds Paradox of Prejudice," *Chicago Tribune.*

[49] Twila Decker, "Racial Unrest has been Simmering in Sleepy St. Petersburg," *The Orlando Sentinel,* October 27, 1996 (quoting the Florida State Advisory Committee's 1996 Report on Racial Tensions in Five Florida cities (including St. Petersburg).

[50] *Id.*

[51] House of Representatives, September 26, 1996 Report 104-846 To Accompany H.R. 3874, "Civil Rights Commission Act of 1996."

[52] *Id.*

[53] *Supra*, note 23.

[54] *Id.*

[55] *Supra*, note 2.

[56] *Id.*

[57] *Id.*

[58] President Clinton's, "The Budget for Fiscal Year 1997," p. 955-956. Interview with James Cunningham, Congressional Liaison Officer, U.S. Commission on Civil Rights (November 8, 1996).

[59] *Id.* at p. 956.

[60] Charles T. Canady, House of Representatives, Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary House of Representatives, October 19, 1995.

[61] Telephone Interview with James Cunningham, Congressional Liaison Officer, U.S. Commission on Civil Rights (November 8, 1996).

[62] Opinion of Comptroller General of the United States, *Matter of: Civil Rights Commission,* B-246541 (April 29, 1992).

[63] In response to Representative Canady's request in the spring of 1996, both the General Accounting Office and Office of Management and Budget have been conducting an examination of the Commission's mission, structure and personnel practices, with a report expected to be released in 1997 (*National Journal's* Congress Daily, July 26, 1996). Telephone Interview with Katherine Hazeem, Head Counsel of Subcommittee on Constitution (November 12, 1996).

[64] *Supra,* note 2.

[65] *Supra,* note 2.

[66] *Supra,* note 37.

[67] *Supra,* note 19.

[68] *Supra,* notes 12 and 19.

[69] Telephone Interview with Katherine Hazeem, Head Counsel of House of Representatives, Subcommittee on the Constitution (November 12, 1996).

[70] *Supra,* note 19.

[71] *Supra,* note 53.

[72] *Supra,* note 19.

[73] *Id.*

[74] Although being approached many times about the assertions in this article, neither the White House nor Office of Public Policy responded to repeated requests for information on President Clinton's record on the U.S. Commission on Civil Rights.

[75] Editorial, "Race," *The Record,* November 3, 1996.

[76] "Memorandum from President Clinton to Heads of Executive Departments and Agencies on Civil Rights Working Group," *U.S. Newswire,* August 8, 1994.

[77] For suggestions and corrections of the article, the author is indebted to Brian P. Waldman, Associate with Arent, Fox, Kintner, Plotkin, and Kahn. For research related to the Commission's subpoena controversy, the author is grateful to Valerie Del Rosario, entry level legal assistant with Arent, Fox. The author, in the end, is responsible for all research and opinions expressed in the article.

Chapter VII

The EEOC at the End of the First Clinton Administration

by Alfred W. Blumrosen

Summary

President Clinton appointed new Commissioners to EEOC in late 1994. Since then, the Commission has actively revised and improved its method of processing charges of discrimination. Most of those revisions are well thought out and long overdue. They arise out of prior efforts of the Commission to cope with an ever increasing caseload. If implemented carefully, these changes will both improve the implementation of EEO laws and free substantial resources to address problems of equal opportunity that cannot be resolved by processing individual claims.

Because of the antagonistic position of the 104th Congress concerning equal employment opportunity, the Commission chose to litigate to establish legal principles concerning discrimination, rather than exercise its own powers by adopting rules and guidelines. This decision leaves the courts, rather than the agency in charge of policy development. The lower federal courts at this time are less than supportive of anti-discrimination principles.

The Commission should begin to develop and assert its policies through well thought out rules and guidelines which are issued after public notice and comment proceedings, rather than leave policies to be decided by unfriendly courts. Litigation should be carried out in support of — not in lieu of — Commission policies adopted after public participation.

The Commission did vote to take public comment on a proposed substantive rule in October 1996. That rule concerns waivers of workers' rights to be free from Age Discrimination in employment. The proposed rule does not fairly protect employees, particularly those who may become involved in a downsizing program. It should be withdrawn for further development.

Introduction

In October 1994, nearly two years after President Clinton's election, his first appointees to the EEOC, including Chair Casellas, took office.[1] A month later, a Republican majority was elected to the 104th Congress. Republicans, in their first control of Congress in 40 years attacked the administration, and sometimes the existence, of equal opportunity laws. They threatened the federal EEO policies with budget restrictions and statutory limitations. They supported the Dole/Canady Bill, intended to stifle affirmative action programs.[2]

Assaults on affirmative action on behalf of "angry white males" reached a crescendo in 1995. These attacks sought to narrow the interpretation of EEO laws by eliminating the concept of affirmative action and by preventing the use of statistical evidence to establish discrimination. They argued that any use of statistics constituted an impermissible quota. These arguments, if accepted, would reduce the EEO laws largely to individual cases of racial or sex animus, established without using evidence of exclusion of women and minorities. Should such discrimination be proved, the opponents of affirmative action would permit only the most limited form of relief for the affected individual.[3] Any effort to modify employment practices which restricted opportunities for women or minorities would be improper affirmative action.

Faced with claims that affirmative action was excessive (promoting undeserving minorities and women), useless (it didn't help unqualified minorities and women), and contrary to principles of equality (assuming a level playing field), the Clinton Administration responded cautiously.

EEOC and the Labor Department both prepared reports showing that "reverse discrimination" claims by white males constituted no more than 3-4% of discrimination claims before the Commission or reported in court decisions.[4] During the spring and summer of '95, the White House reviewed affirmative action programs. The President concluded that we should "mend it, but not end it."[5] By the time of the last presidential debate in October 1996, the President's position was essentially the same.

Question: Do you feel that America has grown enough and has educated itself enough to totally cut out Affirmative Action?

President Clinton: No Ma'am, I don't. I am against quotas. I'm against giving anybody any kind of preference for something they're not qualified for. But, because I still believe that there is some discrimination and that not everybody has an opportunity to prove they're qualified, I favor the right kind of affirmative action.[6]

The White House approach to affirmative action during '95 and '96, was designed to both defuse the potentially divisive political issue and to preserve the essentials of equal opportunity programs. Senior administrators chose not to "make waves" or engage in high visibility actions concerning affirmative action, so long as the Republicans did not make it a national election issue.

The White House policy succeeded. The attack on "reverse discrimination" did not become a major issue in the Presidential election campaign. California Governor Wilson had based his candidacy for the Republican Presidential Nomination on his opposition to affirmative action. He dropped out of the GOP primary fight in 1996. Senator Dole quietly dropped his support for the Dole/Canady bill. Except in California where it was on the ballot, the affirmative action issue did not loom large in the 1996 elections.

The President and his administrators deserve credit for this result, because they defeated the wishes of some to dismantle federal EEO programs.[7] But the attitude of the Congress during '95 and '96 did affect the agenda of the EEOC. The new Commissioners chose to look inward, making "low visibility" decisions to improve internal agency policies and practices which were sorely needed. At the same time, they avoiding major policy initiatives that might have incurred the political wrath of Republican legislators opposed to affirmative action. EEOC decided to leave these policy issues to the courts, which were still dominated by Reagan–Bush appointees. Where policies were developed, they were primarily issued in the form of informal and low visibility guidance to EEOC staff.[8] This informal guidance does not have the legal force of regulations or guidelines issued after public participation through notice and comment proceedings.[9]

The effect of the delay of the White House in making appointments and the Republican domination of Congress in 1995-96 was that during President Clinton's first term, the EEOC did not actively further legal policies concerning discrimination. It has been 16 years since the EEOC played such a role — during the Carter Administration when Eleanor Holmes Norton was Chair. This 16-year period has seen a dramatic increase in management discretion over employment opportunities. The new economy emphasizes managerial flexibility rather than employee security; relies on subjective judgments in employment decisions rather than on specific job requirements; and has a penchant for "downsizing" which creates risk for many who might benefit from the EEO laws. This is a cataclysmic change in the nature of labor relations — as significant as the recognition of collective bargaining in the 1930s. This increased employer discretion makes enforcement of antidiscrimination laws more difficult. Discriminatory attitudes can more easily be concealed within the subjective judgments that a woman or minority was "less qualified," than under the more rigid "objective" qualification standards used by large industry in the 1950-70 period. EEO law has not yet fully addressed the subjective judgment issue.[10]

The Supreme Court has become more skeptical about both the disparate impact doctrine and affirmative action than it had been in the '70s and '80s.[11] The lower federal courts, staffed now by many Reagan–Bush appointees began to follow suit, one actually holding that *Bakke* was not the law, another refusing to allow race to be considered a "tie breaker" in the rare case of equivalent employees, and yet another holding that a mythical "personal crusade" of a white supervisor against a black employee did not constitute racial discrimination.[12]

It is time for a serious administrative modernization of EEO law, to fit the new era of enhanced employer discretion. That initiative should be led by the EEOC. EEOC has the resources and legal status to undertake this project. EEOC has the legal authority, under existing laws concerning age, disability, and equal pay, to adopt policies and interpretations which are *binding* on the federal courts. It has authority to adopt policies concerning race, sex, national origin, and religious discrimination which will be influential in those courts. But the agency is reluctant to exercise these powers under the present political circumstances. It is easier — and politically safer — to file lawsuits and leave the policy decisions to the courts, even though they are hostile to the principles of equal employment opportunity.

The result is that EEOC may forego the opportunity for effective leadership. The elections of 1996 did return the Republicans to control of Congress. But the same election returned President Clinton, with his understanding of the importance of EEO law and affirmative action. Both presidential candidates expressed firm support for the vigorous enforcement of anti-discrimination laws, and Senator Dole stated that discrimination could be presumed when an employer had virtually no minority or female employees in an integrated labor market.

This commitment by both parties to vigorous enforcement of EEO laws means that thoughtful and carefully considered regulations and guidelines are viable. The political risks remain, but they can be moderated by careful planning.[13] Even affirmative action can be addressed. There is no "bright line" between ending employment discrimination and taking affirmative action. Much affirmative action is a response to the lingering effects of past discrimination.

Current issues of employment discrimination law are too serious and important to be left to unsympathetic lower federal courts. The EEOC should adopt rules and guidelines to shape EEO law and policy in the new labor relations era. The agency should use public notice and comment procedures in order to adopt rules and guidelines which will be binding or influential in the courts.[14] The political risks from making "high visibility" decisions must be acknowledged and addressed; they should not be avoided by leaving policy matters to the courts.[15]

The new EEOC leadership acted responsibly between 1994 and 1996 in focusing on improving the internal operation, in light of the political situation, and the genuine need for internal reform. They were properly concerned with the survival of the agency as a vehicle for addressing employment discrimination and with improving its process. The shock arising from the actions of the 104th Congress has justified the EEOC's position up to now. But this shock must now be absorbed, and not continue to dominate agency activities.

The following sections will examine (1) the internal changes which the EEOC has undertaken in the past two years, (2) the policy development program which the EEOC has thus far not undertaken, and (3) problems in the Commission's proposed rule on waivers of workers rights under the Age Discrimination Act.

I. Charge Processing and Litigation

A. Background

The EEOC has, from its inception, been inundated by individual charges of discrimination, and has felt the necessity for allocating most of its resources to these charges. During the 1960s, charges were viewed as vehicles for attacking discrimination, because so many of the employment practices of the era incorporated discriminatory policies. The EEOC initially adopted a formal procedure to identify and remedy discrimination. This formal procedure, while valuable in developing legal guidance, slowed the processing of cases, and helped to create a backlog which began to plague the agency. The first sustained effort to both reduce the backlog and free resources for an attack on systemic discrimination was taken in the late '70s while Eleanor Norton was chair. It consisted of informal settlement efforts, with intensive investigations conducted where settlement failed. The new process reduced the backlog but was criticized by civil rights groups as "claims processing," rather than law enforcement, allowing management to settle cases which would have been good vehicles for a broad legal challenge to discriminatory practices.[16]

This system was dismantled during the 1980s under Chair Thomas, who adopted a misnamed "full enforcement" policy which further reduced the ability of the agency to address discrimination. It utilized more legalistic standards, reduced the cause finding and settlement rates, and increased the backlog. In 1994, a hearing of a Subcommittee of the House Committee on Education and Labor produced serious criticism of the operations of the Commission.[17] Participants challenged the EEOC's emphasis on addressing individual charges. David Rose, well-respected and long-time Chief of the Employment Section of the Civil Rights Division of the Department of Justice, made the point that EEOC was the only agency in government which sought to fully investigate every complaint; I criticized the low settlement and cause finding rates of EEOC and the failure to develop programs to attack discriminatory practices; Susan Reilly, Director of the Washington D.C. field office, described an experimental "triage" program to sort out those complaints which should be fully investigated from those which did not appear likely to identify discrimination.[18]

Statistics comparing complaints to settlements by year have been issued by the Commission. They disclose the following:

Complaints and Settlements Favorable to Complainants: 1985-1996[19]

	1985	1986	1987	1988	1989	1990
Complaints	72,002	68,822	65,844	63,778	59,466	62,135
Settlements	9,114	8,245	7,078	9,128	9,706	10,479
% Settlements	12.65	12.0	10.74	14.3	16.3	16.8

	1991	1992	1993	1994	1995	1996
Complaints	63,898	72,302	87,942	91,189	87,628	77,684
Settlements	9,843	9,566	9,872	9,781	9,345	7,406
% Settlements	15.4	13.2	11.2	10.7	10.6	9.5

The "no cause" rate ranged from 50-60% of resolutions in the 1985-1995 period, and may rise briefly while the weaker cases in the backlog are dismissed under the new charge handling procedures discussed below.

The drop in settlements in '96 is probably due to the energy required to adopt the new charge processing procedures. The effect of these procedures is discussed below.

B. Establishing a new charge handling procedure

When the new Chair and Commissioners were appointed, in late 1994, three task forces were set up by the Chair to address major internal issues.[20] Vice Chair Paul Igasaki headed the task force on charge processing which developed a program to "prioritize" the charges, and to dismiss without prejudice but without full investigation those charges which did not appear likely to establish discrimination. The Priority Charge Handling Procedures (PCHP) were based on experiments in various field offices in "triage" type efforts to screen out weaker cases and give greater attention to stronger cases.

On April 19, 1995, the Commission adopted key sections of the recommendations of the task force, and Chair Casellas commenced implementation at once.[21] The report and implementing document contain a carefully reasoned and thoughtful analysis of some of the EEOC's problems concerning charge processing, and a number of excellent and long overdue recommendations.

For example, EEOC investigators have spent many unnecessary hours explaining the written position of one party to the other, rather than supplying these written explanations to the other party. Chair Casellas has provided for exchange of documents on request.[22] This step alone should save thousands of hours of EEOC time. Similarly, EEOC has spent many hours writing elaborate explanations for their "no cause" decision. This time will be shortened with the adoption of standard language for such decisions, leaving more agency time to address matters likely to indicate discrimination.

The "full enforcement" policy which led to less enforcement was rescinded, thus providing flexibility in connection with charge processing and settlement. The settlement rate has not changed from the earlier period, but is expected to rise as the priority program takes effect. The definition of reasonable cause has been reduced from the likelihood of success in litigation, to whether it is more likely than not that the statute was violated. There was an increase in reasonable cause findings in the first year of the program from 1,410 to 1,547. Paper work has been reduced by the use of generalized short form "no cause" findings rather than a detailed memorandum. The national and field offices were directed to develop agency initiated enforcement programs.

1. Reduction of complaints

New complaints in '96 were down 10,000, from '95, due, it is believed, to more careful counseling about the PCHP. It is possible that this drop is coincidental.[23] The statistics above reflect a variation by that number in both directions over a decade. EEOC intake staff may have advised potential charging parties that their claim was weak and would be dismissed under the new priority charge handling system. This advice may have discouraged complainants from filing charges even though the Commission has expressly directed staff not to discourage complaints. Discouraging complaints will lead to an irrevocable loss of rights by operation of the statute of limitations. Inevitably there will be claims that the agency discouraged a valid complaint. The new system gives wide discretion to intake persons to make judgments without investigation or extensive explanation.

When a potential complainant does not file a complaint, the statute of limitations will wipe out the claim, perhaps without the knowledge of the complainant. On the other hand, when EEOC dismisses a complaint, even in summary fashion, the complainant is notified that he or she has only a limited time in which to protect rights by litigating.

The Commission should present a written statement to potential charging parties that they will lose their claims if they do not file in a timely manner, as some offices are now doing. This would protect the potential complainant from an unwitting loss of rights, the respondents from having to litigate the issue of whether EEOC discouragement led to a late filed complaint, and the Commission from allegations of wrongful discouragement of complaints leading to a loss of rights.

2. The new system described

At or shortly after the filing of a complaint, each case is classified as an A, B, or C. "C" cases are dismissed with a summary letter and a notice of right to sue whenever it is decided that further investigation is unlikely to produce a finding of "cause."[24] "A" cases are not weak factually and appear to fall within national or regional enforcement plan guidelines and will be pursued. "B" cases are those which need further investigation to determine whether they are "A" or "C" cases.

One problem with the "ABC" priority system is that the standards for classification of cases are so broad, that most complaints could be arguably identified as "A" cases, thus defeating the objective of sorting them out.[25] On the other hand, many good complaints may be dismissed out of hand because the evidence which might support the claim has not been produced. For example, many complaints will assert an adverse personnel action, and allege that it happened for discriminatory reasons. The respondent will deny the discriminatory reason and present its legitimate reason in response. How can the agency determine whether further investigation is warranted without expending additional investigative effort? This is the "catch 22" which has always plagued the agency.

The answer may lie in the use of statistics concerning the employment of members of the complainant's race/sex/national origin/age group.[26] Statistics showing the inclusion or exclusion of such persons, as compared to local regional utilization, may tend to confirm the complainants allegation or the respondents explanation. This use of statistics conforms to the most recent Supreme Court interpretation of EEO law, calling for evidence which suggests the likelihood of discrimination.[27] These statistics should be required as a part of respondent's answer to a charge.[28] Supreme Court decisions support the use of statistics to assess the likelihood of discrimination.[29]

3. Initial results of the new system

The Priority Charge Handling system is now in place in the agency. For FY 1995, the field offices had categorized their pending charges as 11% "A," (good claims), 19% "C" (weak claims), and 64% "B" (uncertain). In FY 1996, there were 18% "A" claims, 7% "C" claims, and 69% "B" claims.[30] Thus the net effect appears to be at this point, the dismissal of 7-18% of charges without full investigative efforts. The EEOC inventory of charges one year after the priority charge processing program had been instituted was down by 25,000 cases, from 111,000 to 85,000.

For FY 1996, EEOC reports resolving 103,456 charges, which was 25% more resolutions than charges received. This reduced the backlog by about 25,000 cases. And, 7.15% of those 103,456 charges were settled.

Ten percent (10,060 charges) were classified in category "A". Twenty percent (1,986) of these charges were resolved favorably to the charging party. Fifty-two percent (54,410) were classified as "B" cases. Of these, 8% (4,386) were settled. Thirty-five percent (36,153) were classified as "C" cases, and 2.2% (826) were settled.[31] If these statistics hold up in operation, then the EEOC will reduce its workload by one third, a remarkable achievement for this agency. This has not yet happened because "B" cases, where the Commission is not sure whether the case will dissolve into a "C" or grow into an "A", still represent half of the Commission's work load.

If the settlement rate of the "A" cases rises, then the system may be subjected to the same complaint from civil rights groups that was made to the Norton system, *i.e.*, that it enabled the respondent to "pick off" the cases which would have been good litigation vehicles, by settling them. The enforcement plan seeks to assure that such cases are settled only on substantial terms. The Commission should further address this concern by demonstrating that other regulatory action has improved employment opportunity to a greater extent than by retaining the older system.[32]

4. A reduction of pressure on respondents?

The "C" cases constitute a little more than one-third of the EEOC case load in FY 1996. Once these cases are summarily dismissed, they no longer place employers under an obligation to explain the basis for the employment decision in question. This, in theory, will free the EEOC to address situations where government intervention will have a major impact on employment discrimination.

There is a disquieting concern about EEOC both dismissing 35% of its complaints without investigation, and possibly reducing the number of new complaints filed as well. The EEOC complaint load has been heavily weighted toward discharge cases, and other cases involving incumbent employees.[33] To reduce the complaint load by one-third, ***without a satisfactory substitution of other EEOC activity***, may inadvertently reduce pressures for improved occupational distribution. This has been the most successful aspect of EEO law. More than a quarter of the minority labor force and 10% of the female labor force are in higher level jobs than at the beginning of the EEO era.[34]

This result was obtained in part from responses to complaints and litigation, in part from improved applicant and employee qualifications, and in part from changed management attitudes toward hiring and promoting women and minorities.[35] The improvement in occupational distribution has far exceeded that which could be attributed directly to legal enforcement. It is possible that the mass of complaints which individually had little merit played a role in causing employers to pay attention to equal opportunity laws, totally aside from the merits of particular complaints. The statutory duty of the Commission to investigate claims, rather than the competence with which it acted, or the merits of each claim, may have contributed to improved opportunity, even as the pursuit of weak claims was terribly wasteful for all concerned.

If the pressure generated by these claims is reduced — and not replaced by other pressures — we may inadvertently regress in this area of EEO implementation which has been most successful. This is not an argument for preserving the old system: it had too many serious defects. But this prospect does emphasize the importance of establishing a new system that produces more, not less, employment opportunity.

The system that the EEOC is installing, like any new system, is likely to have "bugs" in it, but it does represent a badly needed systematic effort to focus the Commission on cases where discrimination exists. The old system channeled most of the Commission's energies into finding that discrimination did not exist. The approach now being used gives promise of significant improvement in EEO law enforcement.

5. The need for a regular agency initiated program attacking discrimination

The EEOC does not have a good track record with respect to its self-initiated enforcement efforts over the past 30 years.[36] Twice before, the EEOC has organized major self-initiated systemic programs, with "limited" results.[37] Both times the programs were initiated by energetic Chairs, William Brown and Eleanor Norton. But they were never made a regular part of the operating process of the Commission. The agency has essentially functioned reactively, rather than proactively, in its charge processing and litigating programs. The changes in business organization in the last 15 years include the reduction in size of many employers, and the increase in numbers of smaller employers. Some employers who have "downsized," have failed to maintain their EEO record and reporting systems.[38] Some of them, particularly the newer firms, may never have been reviewed by OFCCP or subject to proceedings under Title VII. They may be "living in the sixties" as far as their EEO policies are concerned. These "smaller" employers are the source of much new job creation. There is no program aimed at assuring that their recruitment, hiring, and promotion processes are consistent with equal opportunity policies. This is a fruitful area for the EEOC to apply policies seeking to prevent unlawful discrimination by educational, and then by tailored compliance activities.

6. An agency directed program dealing with intentional discrimination

The EEOC possesses information which can begin to identify those employers "living in the sixties" who have not internalized the anti-discrimination principle — employers who Senator Dole said during the election campaign should be "punished." Under Supreme Court rulings, there is a presumption that employers who have employed few minorities or women compared to the available workforce in the area, the industry, and the job category are engaging in intentional employment discrimination.[39] Such employers can be identified from EEO-1 statistics. Not all of those employers are guilty of discrimination. Therefore the Commission should not initiate formal charges on the basis of statistics. But the Commission may ask those employers to explain why they have so few minorities and/or women compared to other employers in the same labor market, industry, and job classification.

These explanations may rebut the presumption of intentional discrimination, without subjecting the employer to formal proceedings. Employers who do not provide a sensible explanation for the situation could be asked to adopt a simple affirmative action program. If that were unacceptable, the Commission could take formal action leading, if necessary and appropriate, to litigation. This approach will identify many employers, some of whom employ large numbers of workers. Adopting a program of this type will help to strengthen that educational and deterrent effect of EEOC's presence.

Senior EEOC officials are wary of basing a self-initiated program on statistics. They believe that such a program will be labeled a "quota" system, in which EEOC simply tries to require employers to have certain numbers of minorities and women. But failing to adopt such a program denies the agency the most reliable basis for identifying intentional discrimination — which can be readily and cheaply addressed. The value in a carefully developed program of the sort suggested here is so great that the Commission should proceed carefully, while making sure from the beginning that the program is not a "numbers game."

First, only those employers who employ minorities and women in such small numbers that there is unlikely to have happened by chance, should be identified.

Second, those employers should be given an informal opportunity to explain that the numbers result from non-discriminatory conditions. An employer may, for example, be located on the "edge" of a statistical area, so the availability of minority or female workers suggested by the statistics does not exist. The employees may do such specialized work that workers with the needed skills are not available in fact in the labor market, or that the work itself is not typical for the industry in which the employer is classified, and therefore the labor market statistics are inapplicable.

Third, where employers have not adequately explained the reasons for their failure to hire or promote minorities, the Commission should offer a simple affirmative action program dealing with recruiting, hiring, and promotion standards.

Fourth, in shaping such a program, the Commission should adhere to Justice O'Connor's definition of a quota as a "rigid numerical requirement that must unconditionally be met."[40] The program suggested here is not a "quota program" under that definition.

Fifth, the Commission should use the statistics in conjunction with the information and judgment of the local office with jurisdiction over the area involved. That office may have information about those employers which tends to either confirm or disprove the suspicion of discrimination generated by the statistics.

The Commission envisions an approach based on the knowledge of the local offices, perhaps supplemented by statistics. But this approach will miss those employers who have successfully "hidden" their exclusionary practices from community knowledge. These employers, who may still be "living in the sixties" should be prime subjects for EEOC action.

Most charges which will be summarily dismissed under the PCHP are directed at denials of opportunities for those already employed. A program of the type suggested here would direct some EEOC energies toward expanding initial employment opportunities.[41] The relative unemployment rate for minorities compared to whites is one indicator of discrimination. It has not changed in the 30 years of EEO law, while relative occupational distribution has improved markedly. Directing more agency energies toward initial hiring is appropriate under current economic circumstances.

7. Education of EEOC staff

The Igasaki task force report, pp. 28-29 and 37, notes that the combination of increasingly complex legal standards and new staff responsibility to prioritize charges will increase the importance of "credibility assessment, analytic and writing skills and substantive knowledge" of front line employees. Therefore, hiring, training, and grading standards of EEOC personnel will have to be reviewed. Most people who have dealt with EEOC field personnel would agree.

Most EEOC "training programs" have concerned "how to do the job." They do not educate trainees about such matters as the history of the organization of industry, the way in which management is organized, the general rights of workers under the laws during our history, the history and role of unions in collective bargaining, the way in which labor management relations works, the history of the civil rights movement, and the current problems in labor/management/civil rights relationships. This education in the fundamentals of the employment relationship would enable investigators to better understand the information they obtain and function competently when dealing with various parties. Such a program could be constructed in every major metropolitan area from offerings of local colleges and universities. An investment in the human capital of the Commission staff deserves a high priority.

The Commission gets an A for effort in tackling these seemingly intractable problems of EEO administration.

C. The "National Enforcement Plan" (NEP)

The second step in the restructuring of Commission activity was the promulgation of a "national enforcement plan" (NEP).[42] The plan is based on the need to assure "that available funds are devoted to efforts which have the potential to yield the greatest dividends in achieving equal employment opportunity." The plan envisions a three pronged approach: (1) prevention through education and outreach, (2) voluntary resolution of disputes, and (3) where that fails, "strong and fair enforcement." All of these approaches are furthered by the issuance of legally binding regulations and influential guidelines which establish respondent's rights (as in the Affirmative Action Guidelines) and obligations (as in other Commission guidelines).[43] But the National Enforcement Plan is entirely about charge processing and litigation. It does not take advantage of the specialized powers of the Commission to assist in making law. This is a tragic flaw.

1. The "A" charges

The NEP uses another "ABC" classification system to identify priorities for charge processing and litigation. Priority "A" is for cases "involving violations of established anti-discrimination principles... which by their nature could have a potential significant impact beyond the parties..."

a. Continued litigation of individual discrimination cases

Subcategory "A1" involves cases "involving repeated and/or egregious discrimination, including harassment or facially discriminatory policies." The Commission should not litigate these cases, except when necessary to seek preliminary injunctive relief. They are admirably suited to litigation by the private bar. The prospect of compensatory and punitive damages will facilitate access to private counsel.[44] The only apparent reason for the Commission to litigate such cases would be the unavailability of private counsel in the area. Since the EEOC does not expect to litigate more than 400 of the roughly 10,000 employment discrimination cases filed annually, it must view the private bar as an extension of its enforcement activities. Tracking cases filed by private counsel would enable the Commission to demonstrate its connection to the results, thus securing deserved credit and respect.

Instead of litigating cases which the private bar is competent to handle, EEOC's litigation program should focus on those situations where private litigation may not be effective because of lack of information, or costs of preparation. For example, the identification of employers who may be intentionally discriminating discussed above could lead to informal programs supported by selective litigation.

The downside of the decision to proceed with litigation of individual cases is illustrated by the report of General Counsel Stewart of October 22, 1996, on his proposed implementation of the National Enforcement Plan. He envisions a docket of 350-400 cases which will have "a small number" of class cases involving more than 100 employees, and a "significant number" of class cases involving 20-50 employees. The rest will be individual cases under the National Enforcement Plan. This estimate relies on the NEP to justify maintaining the individual case load. The individual cases would include those that (1) involve areas or groups "underserved" by the Commission; (2) involve high-visibility issues of discrimination; and (3) cases that are too egregious to be ignored. The importance of having these cases litigated is not in dispute. But the question is whether they should be litigated by the Commission itself, to the detriment of situations where the private bar is less able to act.

EEOC can assure that such cases are litigated by competent counsel and leverage the publicity for educational and deterrent purposes, without doing the litigation. Development of legal referral systems to assure charging parties access to the private bar, litigation support for private suits, intervention for a limited purpose, and amicus activities are all methods which EEOC has used in the past and which the General Counsel intends to place on a regularized basis in regional offices.[45]

Given the agency's budget and history, the General Counsel's estimate of 400 cases litigated at any one time appears to be a realistic assessment of the litigation capacity of EEOC. If EEOC continues to litigate individual cases, it will severely limit the systemic cases which can be brought. In these systemic cases, the EEOC has a unique capacity to litigate cases covering a variety of employer practices which can rarely be reached in private class action litigation.[46]

It may be necessary to retain the possibility of individual litigation to meet socially and politically sensitive demands for EEOC action. But that need should be treated as a narrow exception, not as equivalent to the need to address systemic discrimination. Otherwise it will overwhelm the Commission and — once again — cause the systemic program to fail.

b. Litigation of "systemic discrimination" cases

Subcategory "A2" of the NEP includes challenges to broad-based employment practices affecting many employees or applicants, such as those involving discriminatory patterns in hiring, layoff, job mobility, including glass ceiling and pay equity cases.[47] This category holds the promise of an effective enforcement program. But, as the General Counsel points out, the numbers of "large" cases which can be handled at any one time are tiny, and "small" class actions involving 20-50 workers may settle out or draw little public attention. When litigation resources go to individual cases, the resources for this type of litigation are reduced. Respondent lawyers will calculate that the likelihood of EEOC litigation is low, and will advise their clients accordingly.

This category properly identifies areas to which the Commission's resources should be directed. But the entire emphasis in category "A" is on charge resolution and litigation. The plan does not suggest that the Commission will address these questions through its powers as a regulatory agency through rulemaking. This fundamental flaw will be discussed below.

2. "B" claims-statutory interpretation issues

The second category "B", involves questions of statutory interpretation including burdens of proof in disparate treatment cases, liability for harassment, language issues, duty to accommodate religious practices under Title VII, and disabilities under the ADA, interpretation of disparate impact under Title VII, age discrimination act and the ADA; claims alleging multiple bases of discrimination, the legality of arbitration agreements, employee benefits under the ADEA and the ADA. In addition, it includes cases where there is a conflict among the circuits, or where the Commission is seeking Supreme Court review. The problem with this category is not the issues identified, but with the underlying concept that all of these issues should be addressed in investigation, conciliation, and then litigation. This approach leaves the policy/legal decisions in the unfriendly hands of the courts.[48] Even extensive and competent litigation of these matters before an unfriendly forum will not produce outcomes which further the implementation of EEO principles. The absence of any systematic plan to utilize the Commission's rulemaking and guideline issuing powers is painfully evident.

3. "C" cases — protecting the Commission's activities

Category "C" involves protecting the integrity of the Commission's own processes, including claims of retaliation, support of guidelines and regulations, subpoenas, breaches of agreements, and violation of recordkeeping and reporting requirements. Obviously the agency must protect its own processes. There is an impression that it has been overly cautious in seeking subpoenas so that employers have been able to frustrate investigations. The Commission filed 1,070 suits to enforce subpoenas in the 11 years from 1985-1995. During that same time period, it obtained 118,269 "merit resolutions." Subpoenas were sought in .06% of these cases. Since there are many situations where respondents have an interest in limiting the information provided to the Commission, this seems a very modest use of the subpoena power. Enforcement actions are not the only method by which the Commission seeks information for respondents; they are a last resort. Better information on this issue does not appear readily available.

Under the NEP, District offices are required to develop their own enforcement plans. A sample of the public parts of those plans suggest that they do not materially add to the specificity which is lacking in the national plan. To the extent that they identify potential respondents, they may contribute to fleshing out the National Enforcement Program.

The problem with the NEP is not in its announcement. Its objective is valid. But the plan itself commits the agency to use litigation as the primary enforcement strategy, and then to limit the effectiveness of that policy by continuing individual case litigation. It therefore puts fundamental issues of policy and statutory construction in the hands of the courts, rather than in the judgment of the agency. At this time, the judiciary is heavily dominated by judges appointed during the Reagan–Bush years who are not — in general — as sympathetic to the objectives of EEO laws, as those appointed earlier.

D. Will EEOC use rulemaking to develop legal policies?

1. Policymaking by rule or guideline not addressed in the National Enforcement Plan

The National Enforcement Plan does not envision major policymaking initiatives for the Commission through rulemaking and guideline issuance. This is an unjustified self-imposed limitation on the exercise of its regulatory authority.[49]

Litigation is not the best vehicle for development of legal policy. Few cases raise the range of problems which can be addressed together in a rulemaking proceeding. Cases raising policy issues may be resolved on the basis of their specific facts, thus frustrating the effort at formulating policy through litigation, and perhaps requiring many years before a crucial issue is decided. In the final analysis, only the Supreme Court can resolve crucial issues, and the Court takes few cases each year. Comprehensive policy development through our court system is not predictable in even the most carefully planned litigation program.

In contrast, rulemaking and guideline issuing proceedings conducted in accordance with the Administrative Procedure Act, allow for more citizen participation, allow related issues to be considered together as a coherent whole, and allow the Commission's reasoned policy judgment to be given either conclusive or significant weight before the courts. As a litigant, the Commission is on the same level as any other party. As a rulemaking regulatory agency, it has been endowed with significantly more influence. The *Griggs* doctrine of disparate impact, on which much of the success of EEO law depends, was based on an EEOC guideline which the Supreme Court gave "great deference."[50] The doctrine of deference to agency policies has changed since 1971. In 1983, then Justice Rehnquist, for Chief Justice Burger, Justices Powell, and O'Connor stated:

> *A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the Administration.*[51]

This concept was been incorporated into law in 1984. Justice Stevens wrote:

> *an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices — resolving the*

> *competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statue in light of everyday realities.*[52]

Given the totality of these considerations, the failure of an agency to utilize rulemaking or guideline issuing powers is tragic. The other modes of enforcement the Commission is considering — educational programs for respondents, technical assistance, and the like — are all dependent upon the Commission's articulation of detailed legal requirements.

2. The "tender back" issue and the Commission's unwillingness to adopt regulations

The unwillingness of the Commission to utilize rulemaking is suggested by the outcome of the negotiated rulemaking proceeding recently conducted by EEOC with respect to a provision of the Age Discrimination in Employment Act.[53] The provision establishes conditions under which employers may obtain releases of claims of discrimination from workers. The details of that rulemaking effort will be discussed in the next section. There were issues on which the committee — consisting of representatives of employers, workers, and the Commission — could not agree. One was the hotly disputed question of whether an employee who has signed a release of age discrimination claims in exchange for a monetary payment, and then wishes to sue the employer, must "tender back" the money as a condition for litigating. Since these employees will have been dismissed, they will probably have used the money for living expenses, thus be unable to refund it, and thus cannot protect their rights even where they have a valid claim. If they are allowed to sue without tendering the money back, the employer will have lost the benefit of the settlement for which it had paid. The courts have divided on this issue.[54]

Since that issue was not resolved through the rulemaking process, the question was whether EEOC, acting independently of the negotiating committee, would adopt a regulation on the subject. The Office of Legal Counsel has indicated that since the matter was before federal courts, the Commission would not act. This is an example of the EEOC's inclination to leave difficult policy questions to the courts. That inclination is unfortunate, both in general and in this situation. The division among the courts is a perfect occasion for the EEOC to adopt a regulatory position.[55] Such a division makes clear that the issue was not clearly resolved by the Congress. Under the *Chevron* doctrine, the agency judgment concerning the proper position to take will be upheld if it is a "permissible construction" of the law. The agency should not refuse to act on the grounds that the matter is "before the courts," or may be considered "political." The merits of the position developed through the negotiated rulemaking process will be discussed separately below.

3. Rulemaking and the EEOC structure

If the EEOC adopted the policy of using rule-/guideline-making as its basic vehicle for development of policy, a number of structural problems which have long plagued the agency would be better addressed. They are:

a. The relationship between the Chair and Commissioners

This has always been unsettled and sometimes produced sharp antagonisms. If Commissioners participated fully in rulemaking activities, this task would provide a substantial and useful role.

b. The relationship between the Commission staff engaged in investigation and conciliation and the General Counsel

This relationship has also been stormy. But if the General Counsel's role was understood to be primarily to litigate in support of rules/guidelines adopted by the Commission, both "sides" of the agency would appear to have common interests and concerns. This approach would assist the General Counsel in litigation, because of the weight which courts must give to Commission rules. Without that weight, the Commission goes into court as an ordinary litigant. Under the present operating practice, the Commission will ask the General Counsel to litigate important policy questions before unfriendly courts, and yet will not support that litigation with guidelines/regulations on policy issues.

c. The separate role of the Office of Legal Counsel

This office, with approximately 40 lawyers, reports directly to the Chair, and not to the General Counsel. It was established during the Thomas regime because of differences between the Chair and General Counsel. It creates an anomaly in that neither the General Counsel nor the Director of the Office of Legal Counsel is the chief lawyer for the Commission. The Legal Counsel's office develops policy positions, while the General Counsel's office is supposed to implement them in court. Instead of a seamless legal office, the Commission has created competing offices, with overlapping functions. This part of EEOC governance needs reinventing. David Rose made eminent sense in 1994 when he recommended that all the legal activities of the Commission be directed by General Counsel.[56] The only qualification would be in connection with federal employee hearings where separation of functions may require separate counsel for the Commissioners. Part of the problem is that the General Counsel is a Presidential Appointee, by an accident of the legislative process. In 1993, I suggested that since EEOC does not have "judicial" powers, there is no legal reason for an "independent" General Counsel.[57]

4. A possible rulemaking agenda

A rulemaking agenda for EEOC today might look like this:

1. Reductions in force which may have disparate impact on groups protected by EEO laws. This is extraordinarily important because employers have virtually insulated themselves from EEO law while deciding who will be discharged in a downsizing. In advance of the downsizing, employers publish an ERISA plan to give severance pay to employees who are terminated in exchange for a waiver of discrimination claims. Because the employer knows that virtually all the terminated employees will sign the waiver out of economic need, management knows it will not be held legally responsible for violations of EEO policies during the downsizing. EEOC is not bound by such waivers and can enforce statutory anti-discrimination principles in such a situation;[58]
2. The scope of permissible affirmative action programs of state and local governments;[59]
3. The use of selection procedures based on subjective judgments of the employer in connection with (a) initial hiring and (b) promotion to jobs above the "glass ceiling;"[60]
4. Under the ADEA, the nature of information required to be disclosed in connection with a "group exit program" under the OWBPA amendments to the ADEA, and the effect of inadequate information on the statute of limitations (these issues are partly addressed in a negotiated rulemaking proceeding which is discussed elsewhere in this paper);
5. The application of the Uniform Guidelines on Employee Selection Procedures to reductions in force; and to age discrimination claims;[61]
6. The interpretation of ambiguous provisions of the 1991 Civil Rights Act (for example, whether the practice of "banding" test scores is permissible under the "race norming" amendment to Title VII);
7. The appropriate role for private arbitration in the resolution of discrimination disputes.[62]

E. The alternative dispute resolution approach

The task force recommended a pilot program which would involve mediation of charges before any investigation had taken place. District offices are expected to use volunteer mediators, and EEOC has entered into a contract with the Federal Mediation and Conciliation Service to train personnel. They expect to experiment with 400 newly filed charges. This approach should be tested during late '96 and '97. The mediator will serves as a "neutral" discussion leader and facilitator. This is a different role than that of the EEOC conciliator, who seeks relief for the charging party to eliminate a risk of litigation. A "true" mediator inevitably pushes the weaker party toward the position of the stronger, and seeks an acceptable outcome without pressing for either party's interests. Because there is usually a disparity between the skills and knowledge of parties, as well as their resources, the Commission should treat this experiment with as many social science type controls as possible, to determine whether its use furthers Title VII objectives of ending discrimination as effectively as other methods.[63]

There may be charges which this process can resolve, even though in the mediation process, the respondent is likely to be better prepared than the complainant. The possibilities are suggested by the small fraction of "B" and "C" cases which have been settled without serious expenditure of EEOC energy. It is not clear that this process will improve fair settlement prospects sufficiently to warrant expenditure of EEOC time and energy. However, the experiment is certainly worth conducting.

II. Waivers of Age Discrimination Claims and Downsizing — The Negotiated Rulemaking Experiment

Since the early '80s, between 30 and 40 million employees have lost their jobs through a downsizing or restructuring process. Employers have exercised their subjective judgments to discharge "surplus" employees with a virtual immunity from the panoply of federal and state laws protecting employee rights.

The result has been a near resurrection of Wood's rule — the 19th century doctrine that the employer has unlimited discretion with respect to selection, terms, and termination of employment. This was accomplished by the development of the most sophisticated labor relations document since the complex collective bargaining agreements of the 1950s — the Downsizing Plan. The Downsizing Plan is a technical legal masterpiece which, in its mature form, integrates state contract, tort and statutory law, and federal laws which include the National Labor Relations Act (NLRA), the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), the Worker Adjustment and Retraining Act (WARN), and the unlikely centerpiece, the Employee Retirement Income Security Act (ERISA). It incorporates concepts of exhaustion of remedies, preemption, and employer discretion. The Plan effectively circumvents the operation of a corpus of federal and state law built up over a 30-year period. The Plan is so massive — running more than a hundred pages with large sophisticated employers — and so complex, that its ramifications are rarely understood. While there are hundreds of court decisions under various doctrinal headings in connection with downsizing, the courts have not had the occasion to grasp the magnitude of the Plan. Collectively the decisions are reminiscent of the story of the blind men and the elephant.[64]

The centerpiece of modern downsizing is a plan mandated by ERISA in which the employer outlines *in advance* its intended downsizing and obligates itself to give severance pay to those employees who are to be discharged, if they waive all of their rights and claims under federal, state, or local law. The employer selects and then discharges employees, knowing before it decides who to terminate, that equal employment and other laws will not be enforced because those terminated will sign the waiver to get the severance pay. Knowing this, the employer can safely disregard anti-discrimination laws and other federal and state laws, in deciding who to discharge.

These employer decisions are made on the basis of judgments as to whom will best fit in the reduced structure — judgments that have a major element of subjectivity and may be influenced by conscious or unconscious bias against newly integrated minorities and women, and long-time employees who are "too old to hunt."[65] Because of the waiver, the employer need not fear the enforcement of these equal opportunity laws. The laws have little in *terrorem* effect because management knows that their decisions as to whom to discharge will not be litigated. The result is virtually the same as a prospective waiver of employee rights, which is explicitly prohibited by the ADEA. In circuits which require the employee to tender back the severance pay before a waiver can be challenged, the protection of the employer decision-making process from judicial scrutiny is virtually complete.[66]

The EEOC stepped into the very heart of the downsizing process in 1995 when it undertook a negotiated rulemaking proceeding to resolve some apparently technical problems concerning waivers of EEO rights under the 1990 amendment to the Age Discrimination in Employment Act. Because the waiver issue is so central to the downsizing process, EEOC should not have asked an interest-based negotiating committee to develop a rule. The public interest in the fair operation of a system which has affected 30 or 40 million workers should not be entrusted to a few individuals with the limited agendas of the groups they represent.

Formal negotiated rulemaking is a new innovation in administrative law, established by the Negotiated Rulemaking Act.[67] It is intended to facilitate participation of interested parties in the initial development of regulations. Under the "Reg-Neg" statute, EEOC identified six different groups with an interest in the issue, and then selected a committee of 20 persons, including two Commission staff members. Personnel from the FMCS served as facilitator. The committee reached agreement in July 1996 and in October, the Commission voted to initiate a notice-and-comment rulemaking proceeding utilizing the committee's proposal.[68]

The negotiated rulemaking process has both theoretical and practical advantages and disadvantages.[69] In light of the importance of the waiver in the downsizing process, the proposed rule adopted by the negotiating committee was a victory for employers and badly slighted employee interests. The issues involved in this negotiated rulemaking exercise are both fundamental and technical. Some result from unclear drafting of the legislation, and some involve basic policy judgments concerning the interpretation of the act. The Age Discrimination in Employment Act was amended in 1990 to permit employees to waive their rights under defined circumstances.[70] The statute makes such waivers valid if they were "knowing and voluntary." It sets several minimum conditions which must be met before waivers could be considered "knowing and voluntary." It imposed additional requirements for waivers in connection with reductions in force, whether conducted on a voluntary or a discharge basis. Employers must supply terminated employees with statistics concerning the ages of persons being terminated and those being retained, so that employees can decide whether there might be age discrimination in the downsizing process before signing the waiver.

The flaws in the proposal include:

- It does not define the key term "knowing and voluntary." The term "knowing" is inherently ambiguous. It may mean "being conscious of the activity which is being undertaken." Used in this sense, it would include an employee who is aware that he or she is signing a waiver of federal rights. The word "knowing" may also mean "being aware of the substance of the claims which are being waived." A third meaning is "being aware that he or she is also surrendering claims of which he is unaware." A fourth meaning is that the employee and employer are both aware of the same information concerning the employee claims which are being waived, that the employer is not aware of discrimination claims of which the employee is ignorant. The choice of meaning to be given to the statutory term "knowing" will influence the interpretation of the entire section, including nature of the information which the employer is required to provide in connection with a downsizing. But without a general definition of " knowing," there is little guidance as to how to interpret the scope of information which the employer must give to the employee or how to evaluate that information.

  "Voluntary" may mean "uncoerced." We can assume that physical coercion or fraud are encompassed by the term. But how much economic pressure may an employer place on an employee to get him or her to sign a waiver before it becomes coercion. May an employer tell an employee "you are fired, and will not get a favorable recommendation" unless you sign a waiver? This question is intimately related to the definition of "consideration." If consideration means "anything of value" beyond what the employee was entitled to, as the proposed rule states, then a favorable recommendation would count as consideration. The Commission should require substantial consideration to qualify as consideration to support a waiver of federal rights.[71]

- The proposed regulation does not state whether the "disparate impact" doctrine applies under the ADEA. This issue is also critical in deciding how much information must be supplied to employees. If employees must prove "disparate treatment," the information may be limited to those with whom the employee was compared. If a reduction in force which has unjustified disparate impact is also prohibited by law, then a wider field of information must be provided. While EEOC regulation 29 CFR 1625.7 (D) adopts some aspect of the disparate impact doctrine to the ADEA, it does not constitute a forthright adoption of the principle.[72] Several Supreme Court Justices have doubted that the doctrine applied under the statute prior to the 1990 amendment. The 1990 amendment requires information which is different from that necessary for a disparate treatment case. This reflects an acceptance in 1990 by Congress of the disparate impact doctrine at least in connection with reductions in force.[73]
- The Draft permits some "prospective" waivers, which are prohibited by statute. It states that the statute does not bar "agreements to perform future employment related actions such as the employee's agreement to retire or otherwise terminate employment at a future date." This is an invitation to evade the prohibition on prospective waivers. Under this language, an agreement would be valid in which the employee stated that, "I agree that the employer may terminate my employment at any time within the next five years, and waive my rights under federal EEO laws with respect to that action."
- While the statute requires "additional consideration" for a waiver of the right to sue, the proposal defines "consideration" as anything of value, thus permitting the employer to buy off rights to be free from discrimination for nominal sums, or for nothing more than a statement that the employee was released for reasons other than poor performance.
- The proposal permits employees to agree with employers to waive the time periods of 21 to 45 days which Congress has provided for them to consider the employer offer. These time periods were intended to give the employees an opportunity to consider, with advice of counsel, whether it was in his or her best interests to sign the waiver. An employee may choose to sign or reject the waiver without exhausting the time period, and if he signs within the period, the seven day reconsideration period would then begin. But Congress vested the choice on this question with the employee alone. There is no apparent rationale for involving the employer in the decision concerning that choice.
- The section which defines the scope of the information which the employer must supply to the employee is ambiguous. It may permit the employer to structure its downsizing program in a way which will conceal, rather than disclose, possible age discrimination. This results from the fact that the term "decisional unit" is defined by reference to the ***employer's*** decisional process, not by reference to the ***employee's*** need for information concerning the possible discriminatory effect of the reduction in force.[74] The proposal does not even state that employees need the information to determine if there may have been age discrimination in the reduction in force.

The errors of omission in the draft are as important as the errors of the Commission, particularly when waivers are viewed as part of the downsizing process. That is:

- There is no record keeping and retention requirement so that the accuracy of the information provided by the employer can be reviewed.
- There is no reference to the question that should be crucial to EEOC — *i.e.,* whether the elements which Congress required for a waiver to be "knowing and voluntary" under the ADEA are also applicable to those statutes which are ***"in pari materia"*** and are to be construed similarly, including Title VII and the ADA. This is particularly important in addressing sex, race, or national origin discrimination in connection with a downsizing.

- There is no reference to whether the Uniform Guidelines on Employee Selection Procedures, which requires the keeping of records of the adverse impact on race, national origin, and sex of employers practices are applicable to reductions in force.

These flaws, and others, should have been examined by the Commission before it approved the draft as the basis for notice and comment rulemaking. The draft itself is a useful starting point for shaping a comprehensive regulation which addresses the policy questions noted above. The Commission should have referred the matter to a drafting committee within the agency, and sought to cooperatively develop regulations with the Department of Labor.

While technically, the Commission is free to address other issues not resolved in the proposed rulemaking at any time, it is unlikely to do so. To act in the near future would appear to involve the Commission in "piecemeal" rulemaking which is burdensome to all of the interested parties, and would suggest that the Commission had not fully thought through the initial proposed rule. Senior Commission staff has indicated that the Commission is unlikely to propose a rule on the "tender back" issue on which the Committee was unable to agree.

The Commission's decision to publish this proposal for comment may have been based in part on the fact that it had initiated the process. There might be some embarrassment in not acting on the results. Experiments such as this are necessary and valuable as an effort to improve governmental performance. But not all experiments yield satisfactory results. The Commission should not be embarrassed if the experiment did not work out as well as anticipated. There is greater embarrassment in issuing a proposed rule for notice and comment if the Commissioners are not satisfied that the contents of the rule represent their best policy judgment.

Furthermore, the Commission has a good track record since the mid 1970s of careful consultation with interested groups in connection with serious rulemaking efforts.[75] Their mixed success in court have been due to disagreements on substance, not on inadequate public participation.

A notice of proposed rulemaking requires considerable energy, effort, and emotion on the part of individuals and groups who are interested enough in the substance to respond. The Commission should not impose that burden, unless the agency itself is convinced of the wisdom and legality of the proposal. Of course, the agency must remain open to alteration or modification of that judgment — that is the purpose of the comment period. But agencies should initiate the formal notice and comment period only after they have satisfied themselves as far as possible, that they have developed an appropriate regulation.

Where the results of the negotiated rulemaking are not satisfactory, rather than commence the formal process of rulemaking, the Commission should continue developing the proposal internally, before submitting the issue to formal public comment.

Rulemaking in the equal employment area is inherently difficult because there are many groups with varying interests that the law does not clearly resolve. Regulations deal with complex problems where public and group interests are frequently in a state of conflict and flux. This type of situation is called "polycentric" because it does not lend itself to simplistic resolutions. In such a complex situation, the "negotiation" format, where representatives of groups and the government sit together at a negotiating table, is likely to be unproductive. Interest group representatives are more likely to state their "real" needs quietly to a government official, than to confess them before opposing groups. There is little likelihood of a successful meeting of the minds in public on important issues unless the groundwork has been carefully laid in private conversations.[76]

Finally, unless the government itself takes principled positions in the negotiation process, there is little incentive for any interest group to move from their initial stance. If they do not change their positions on important questions, the result is likely to be a "lowest common denominator" proposal which does not firmly address disputed issues.[77] For these reasons, "Reg-Neg" is not likely to be useful in developing civil rights policies. Informal discussions between the agency and the interest groups both before and after a notice of proposed rulemaking is issued are crucial to have effective and workable regulation. But the "Reg-Neg" format is not necessary to achieve that result, and may be counterproductive.

III. The Larger Vision

In the report prepared two years ago, I recommended that EEOC address broader issues that affect employment opportunities, such as the fact that lower skilled job opportunities have left the central cities for the suburbs and for exurbia. If that is the case, should not the Commission devise informational programs to encourage minorities (particularly those with children) to "leapfrog" from the inner cities to exurbia where schools are better, crime is less, and job opportunities for those with limited skills are better?[74] The General Counsel reports that the Commission has or is about to file litigation concerning job advertising which would deprive inner city workers of notice of jobs in suburban or exurban areas. This is a commendable start, but the subject is a perfect one for the adoption of a specific program.[75]

The Commission has, understandably, been immersed in its immediate case processing problems, and has made a good start with respect to them. Now, it must begin to develop a perspective to assure equal employment opportunities within the larger framework of America's changing industrial and commercial activities.

Endnotes

[1] During that first two years, EEOC had not made serious changes in the policies and practices developed during the 12 years of the Reagan–Bush Administration — policies and practices which narrowed EEOC's enforcement of the anti-discrimination laws. "As a result of the policies instituted in the 1980s, and the absence of new leadership, the Commission has continued its drift into inconsequentiality." Alfred W. Blumrosen, The Equal Employment Opportunity Commission, Chapter VIII, pp. 103 in Corrine M. Yu and William L. Taylor, eds, NEW CHALLENGES; REPORT OF THE CITIZENS COMMISSION ON CIVIL RIGHTS, THE CIVIL RIGHTS RECORD OF THE CLINTON ADMINISTRATION MIDTERM, (1995). [Hereafter cited as MIDTERM REPORT. The other Commissioners appointed by President Clinton are Vice Chair Paul Igasaki, Paul Miller, and most recently, Reginald Jones. Chair Casellas, Vice Chair Igasaki, General Counsel Stewart, and Legal Counsel Vargyas were most helpful in connection with the preparation of this report.

[2] S. 1085, 104 Cong. 2d Sess. 1995

[3] U. S. Department of Justice, Office of Legal Policy. 1987. *Redefining Discrimination: Disparate Impact and the Institutionalization of Affirmative Action. Nov. 4, 1987.*

[4] Briefing Book on the Status of Equal Employment Opportunity in the American Workforce, March 24, 1995, issued by the EEOC Office of Communications and Legislative Affairs; Alfred W. Blumrosen, *How the Courts Are Handling Reverse Discrimination Claims,* draft report published in Bureau of National Affairs, Daily Labor Report, March 23, 1995. The Report had not been released by the Department or by myself.

[5] Statement of July 19, 1995. Weekly Compilation of Presidential Documents, July 24, 1995, pp. 1255-1265. The review was conducted under the direction of Harvard Law Professor Chris Edley. The President's speech referred to *Adarand Constructors, Inc. v. Peña,* 115 S. Ct. 2097 (1995).

[6] *New York Times,* Oct. 17, 1996.

[7] Ironically, the arguable decline of this support was due to the success that affirmative action and EEO law enforcement in improving the occupational position of women and minorities. As of 1994, it appeared that a quarter of the minority labor force, some 5-6 million persons, were in higher level jobs than would have been the case earlier, and the same was true of 10% of the women workers, or nearly 5 million. This established a new perspective for younger voters who never lived in the era of overt segregation and restriction. *See* Alfred W. Blumrosen, MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY, 315-317 (1993, University of Wisconsin Press.) [hereafter, MODERN LAW]

[8] The Director of the Office of Legal Counsel provided the author with a list of 10 steps to provide guidance and regulations during the Casellas administration. Seven of the 10 were in the form of internal enforcement guidance, which does not have legal force. One was a Commission decision on the Title VII exemption for Indian Tribes, another was a regulation covering apprenticeship programs under the ADEA, and the third was a notice of proposed rulemaking concerning Waivers of Rights under the ADEA. This latter proposal will be discussed separately in the text. The issues on which "enforcement guidance" was issued were: Workers Compensation and the ADEA; after acquired evidence; pre-employment disability related questions under ADA; definition of disability under ADA; disability and service retirement plans under ADA, standing of testers to file charges; significance of *O'Connor v. Consolidated Coin Caterers Corp.,* 116 S. Ct. 1307 (1996).

[9] MODERN LAW, note 7, *supra* 30-31.

[10] *Watson v. Fort Worth Bank and Trust,* 487 U.S. 977 (1988) recognized that the disparate impact doctrine applied, but weakened the disparate impact doctrine itself in order to reach this decision. *Wards Cove Packing Co., Inc. v. Atonio,* 109 S.Ct. 2115 (1989). Congress reversed the weakening of the disparate impact doctrine in the

Civil Rights Act of 1991. 105 Stat. 1071 (November 21, 1991). But the courts have not addressed the subjective judgment issue in light of a "stronger" disparate impact doctrine.

The Uniform Guidelines on Employee Selection Procedures-1978 are based on the concept of a "job" with objectively defined parameters. Equal Employment Opportunity Commission. *Uniform Guidelines on Employee Selection Procedures (1978),* 43 Fed. Reg. 38290 (1978); 29 C.F.R. 1607.1-18.(1980). Jobs involving much discretion do not fit comfortably within its pattern.

[11] *Compare Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) with *Wards Cove Packing Co., Inc. v. Atonio,* 109 S.Ct. 2115 (1989). *Compare United Steelworkers v. Weber,* 443 U.S. 193 (1979) and *Johnson v. Transportation Agency, Santa Clara County,* 480 U.S. 616 (1987), with *Adarand Constructors, Inc. v. Peña,* 115 S. Ct. 2097 (1995).

[12] *Hopwood v. State of Texas,* (No. 94-50664, 5th Cir. Mar. 18, 1996); *Taxman v. Bd. of Ed. of Piscataway* (3rd Cir. Aug. 8, 1996); *St. Mary's Honor Center v. Hicks,* 113 S. Ct. 2742 (1993).

[13] An example of how EEOC should **not** act was provided in 1994, when the Commission issued a notice of proposed rulemaking which extended race and sex harassment principles to discrimination on grounds of religion. This was done for reasons of mechanistic symmetry, apparently without analyzing the potential interference with religious freedom or any balancing of the various policies involved.

[14] The *Chevron* Doctrine makes agency regulations binding on the courts if (1) Congress has not addressed the precise issue and (2) the agency interpretation is a permissible construction of the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). The doctrine is applicable only where the agency has substantive rulemaking power. EEOC has such powers under the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Equal Pay act. It does not have general rulemaking power under Title VII dealing with race, religion, sex, or national origin. Nevertheless, EEOC guidelines issued through the same notice and comment procedures which are applicable to rules, are entitled to "great deference" from the courts. This principle was applied to a regulatory scheme similar to Title VII in *Skidmore v. Swift and Co.,* 323 U.S. 134 (1944). The *Skidmore* principle was applied to EEOC in *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971). For example, EEOC guidelines concerning testing and sex harassment have been upheld by the Supreme Court. *See Griggs, supra, Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975), *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986). For a discussion of the importance of rule/guideline making in the regulatory process, *see* MODERN LAW, note 7, *supra,* at 24-31, 238-40.

[15] "The agency which invokes the "notice and comment" procedure pays a price of visibility and delay. The visibility comes because the process is initiated by and appears to be a conscious choice of the agency head or other official. That person is not responding to the traditional demands to decide a specific case, but rather is reaching out to intrude on a problem in a way which will make some of the participants unhappy. Those participants may mobilize to eliminate the individual from the government position, or to prevent the proposed rule from being adopted." MODERN LAW, note 7, *supra,* 264-266.

[16] MODERN LAW, note 7, *supra,* 163-165. *See* Michael Selmi, The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law, 57 *Ohio State. L. Jour. 1* (1996).

[17] Oversight Hearings on the Equal Employment Opportunity Commission, Subcommittee on Select Education and Civil Rights, Committee on Education and Labor, July 26, 1994, Serial No. 103-115.

[18] Hearings, note 17, *supra,* Rose testimony p. 40, 51-52, Blumrosen, p. 12-13, Reilly, 84-111.

[19] This table identifies the number of complaints and settlements in each year, and the percentage that settlement represents of complaints. The settlements in any year may not include complaints filed during that year. Settlements include cases settled during investigation, complaints withdrawn with benefits and successful conciliations. The settlement rate is influenced by the numbers of complaints, so that in a year of relatively low complaints, such as '89 and '91, an average number of settlements (in the 9,000 range) would yield a higher than

average percentage. In eight of the 12 years covered, settlements were in the 9,000 range. Chart constructed from EEOC Enforcement Statistics, FY 1985-FY 1995, and data tracking narrative highlights of EEOC Field Office Activities, Office of Program Operations Report to the Commission, October 22, 1996. These figures are for complaints filed directly with EEOC only, and do not include charges filed with State Fair Employment Practice agencies. The statistics vary from the MIDTERM REPORT, n. 7 p. 109, because the base statistics vary.

[20] One task force dealt with EEOC's relation to state Fair Employment Practice agencies. Chaired by Commissioner Joyce E. Tucker, it addressed largely technical intern-agency relationship problems, and will not be discussed here. Another dealt with alternative dispute resolution, chaired by Commissioners R. Gaull Silberman and Paul Steven Miller. It is discussed elsewhere in this chapter.

[21] EEOC Charge Processing Task Force (December 1994-March 1995); EEOC Priority Charge Handling Procedures, June 20, 1995.

[22] Priority Charge Handling Procedures, p. 10.

[23] EEOC staff attributes part of this reduction to the fact that EEOC offices were closed during the interruption of government services in 1995-96 by differences between Congress and the President. It is difficult to believe that many complainants would waive their rights because they had to wait a week or so to file a complaint with EEOC.

[24] This can take at intake, after receipt of the respondents explanation and the complainants reply, or later at any stage when the quest for evidence of discrimination appears unlikely to succeed.

[25] The standards are found in the National Enforcement Plan, discussed below.

[26] This methodology may not work for religious or disability discrimination cases because of the lack of statistics.

[27] It follows the approach of the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), *Furnco Construction Co. v. Waters,* 438 U.S. 567 (1978) and *O'Connor v. Consolidated Coin Caterers Corp.* 116 S. Ct. 1307 (1996). This approach is followed by the district courts in reviewing discrimination cases. Blumrosen, MODERN LAW, note 7, *supra* 168-69, Alfred W. Blumrosen, "The Legacy of *Griggs:* Social Progress and Subjective Judgments." 63 *Chicago-Kent Law Review 1* (1987).

[28] The nature of the statistics sought should reflect the issues raised in the charge. A refusal to hire case should require statistics comparing the respondents employment in with availability in similar industry, job classification, and geographic area.

[29] *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Furnco Construction Co. v. Waters,* 438 U.S. 567 (1978).

[30] EEOC Office of Program Operations, Report, Oct. 22, 1996.

[31] The last figure is self-serving. Once EEOC decides that a case is a "C," it will not expend more energies on it. Thus the negotiated settlements in this category may represent situations where the respondent was willing without pressure to respond to the complaint.

[32] The Commission maintains estimates of the dollar value of settlements.

[33] John J. Donohue III & Peter Siegelman, "The Changing Nature of Employment Discrimination Litigation," 43 *Stanford L. Rev.* 983 (1991)

[34] *See* MIDTERM REPORT, note 1, *supra.*

[35] MODERN LAW, note 7, *supra,* 310-314.

[36] MODERN LAW, note 7, *supra,* 174-176.

[37] The EEOC in the early '70s conducted a "national enforcement program" involving five major employers and unions. In 1979, the Commission organized a self-initiated systemic program, which was not implemented by the time the Reagan Presidency began. MODERN LAW, note 7, *supra,* 174-176. The structure of the program was approved by the Supreme Court in *EEOC v. Shell Oil Co,* 466 U.S. 54 (1984).

[38] U.S. Department of Labor, *Pipelines for Progress,* August 1992, pp. 19-21, 24-25, 30-31.

[39] *Teamsters v. United States,* 431 U.S. 324 (1977); *Hazelwood School District v. United States,* 433 U.S. 299 (1977); *EEOC v. Shell Oil Co.,* 466 U.S. 54 (1984).

[40] *Sheet Metal Workers Local 28 v. EEOC,* 478 U.S. 421 (1986).

[41] *See* Donohue and Seligman, note 32, *supra,* Alfred W. Blumrosen, "The Duty of Fair Recruitment Under the Civil Rights Act of 1964", 22 *Rutgers L. Rev.* 465 (1968).

[42] EEOC, 1995.

[43] Educational programs, to be useful, must "educate" about specific standards or they degenerate into platitudes which are not likely to influence the behavior of regulated groups. "Voluntary compliance" as a means of changing respondent's behavior also requires knowledge of what the law is likely to require if "volunteerism" doesn't work. *See* Alfred W. Blumrosen, "Six Conditions for Meaningful Self Regulation." 69 *American Bar Association Journal 1264* (1983).

[44] MIDTERM REPORT, note 1, *supra;* Michael Selmi, "The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law," 57 *Ohio State. L. Jour.* 1 (1996),

[45] Memorandum in author's files from Susan Oxford, Attorney Advisor to General Counsel, Nov. 8, 1996.

[46] "Across the board" private class actions were permitted until the Supreme Court restricted them in *General Telephone Co. v. Falcon,* 457 U.S. 147 (1982). EEOC is exempt from Rule 23 requirements.

[47] Among the cases which the EEOC has filed or intervened in are *Publix Super Markets* (alleged dead end jobs for females); *Mitsubishi Motor Mfgr. of America* (alleged sexual harassment and constructive discharge); *Roberts v. Texaco* (promotions); *KPMC v. Peat Marwick* (alleged refusal to consider older applicants); *Oak Lawn Holiday Inn* (alleged failure to hire African Americans, Hispanics); *Rockwell International* (alleged use of test for potential carpal tunnel syndrome to reject applicants); *Selkirk, Metal Bestos, Inc.* (failure to promote, denial of training, harassment); *Lockheed v. Martin Marietta* (age).

[48] This is appropriate of course, when the issue, as in *St. Mary's Honor Center v. Hicks,* 113 S. Ct. 2742 (1993), involves judicial procedure.

[49] MODERN LAW, note 7, *supra,* p. 24-31.

[50] *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971). Alfred W. Blumrosen, "Strangers in Paradise: *Griggs v. Duke Power Co.* and the Concept of Employment Discrimination," 71 *Michigan Law Review* 59 (1972). Sex harassment law is based largely on a Commission regulation upheld in *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986).

[51] *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Ins. Co.,* 463 U.S. 29 (1983).

[52] *Chevron, U.S.A. v. Natural Resources Defense Council,* 104 S.Ct. 2778 (1984)

[53] This was the first, and so far only, significant rulemaking effort of EEOC in 1994-96. The other matter was the repeal of an exception granted apprentice programs under the ADEA.

[54] *Compare Oberg v. Allied Van Lines,* 11 F.3d 679 (7th Cir. 1993), *cert. denied,* 114 U.S. 2104 with *Wamsley v. Champlin Refining and Chemicals Co.,* 11 F. 3d 534, *rehg. en banc denied,* 37 F.3d 634 (5th Cir. 1993), *cert. denied,* 115 S. Ct. 1403. *Wamsley* held that a waiver which was invalid under the ADEA was nevertheless ratified by an employee who failed to return the amounts paid by the employer to obtain the waiver. *Oberg* held that the invalidity of such a waiver was not cured by the employee's retention of benefits.

[55] When Congress amended the Age Discrimination in Employment Act to specify the conditions under which a waiver would be considered knowing and voluntary, it placed the burden of demonstrating that these conditions had been met on the employer, not the employee. The requirement of a "tender back" of the severance pay before the waiver can be challenged relieves the employer of the burden allocated by Congress. The *Wamsley* decision interpreted the act by applying state contract law concepts. But state contract law is preempted with

respect to severance pay plans by ERISA. The "tender back" question must be resolved by an interpretation of the statute in light of its policies, a task which both the Wamsley and Oberg opinions undertook, reaching different conclusions. Because the "tender back" issue depends on the interpretation of the statute, the Commission has authority to adopt a regulation on the issue.

[56] *See* note 17, *supra.* This conclusion was drawn long before the incumbents in those two positions were identified, and has nothing to do with the individuals who hold those offices.

[57] *See* MODERN LAW, note 7, *supra,* pp. 396 note 3.

[58] Rules relating to reductions in force might include (a) a specification that the Uniform Guidelines apply to reductions in force; (b) a requirement that the recordkeeping provisions of the Uniform guidelines apply to age discrimination questions in connection with reductions in force (3) a definition of "business necessity" in connection with reductions in force and (4) a full examination of the waiver issues discussed in part IV of this report.

[59] The issue of whether Congress intended to subject state and local governments to the same standards as private employers, when it amended Title VII to include those bodies, is a matter of statutory interpretation. The EEOC has assumed this to be the case in the Uniform Guidelines and the Affirmative Action Guidelines. It is also addressed in *Connecticut v. Teal,* 457 U.S. 440 (1982). On this premise, it appears that Congress intended that the principles of *United Steelworkers v. Weber,* 443 U.S. 193 (1979) and *Johnson v. Transportation Agency, Santa Clara County,* 480 U.S. 616 (1987) were intended by Congress to apply to state and local agencies. A formal statement to that effect adopted by the Commission pursuant to notice and comment rulemaking would be influential in clearly establishing the point. Once that point was established, then the constitutional law principle in *Katzenbach v. Morgan,* 384 U.S. 641 (1966), may be applicable. That principle gives Congress a broad power to interpret the 14th Amendment pursuant to section 5. *See* Justice Stevens opinion in *Adarand Constructors Inc. v. Peña,* 115 S. Ct. at 2126 n. 11. (1995). Under that broad power, the *Weber* and *Johnson* principles concerning affirmative action may be applicable to the states even though the constitution operating without Congressional gloss might produce different results. While the Commission has an important role in interpreting the statute, it has a less important role in applying the constitutional principles. However, if it concludes, as suggested, that Congress did intend to apply *Weber* and *Johnson* to state and local government, it has at least a preliminary opportunity to address the constitutional questions concerning the scope of Congressional power under the existing precedents concerning Section 5 of the 14th Amendment. The last word on these questions rests squarely with the courts.

[60] The Commission might wish to set out considerations that would influence decisions on the legality of the selective judgment process, which would consider (1) whether the supervisors were instructed to resolve issues based on the merits, not on extraneous factors such as race, sex, or age, unless the employer was entitled to take affirmative action, in which case, supervisors should be so instructed (2) whether individual decisions were regularly and seriously reviewed by supervisors (3) whether records required by the Uniform Guidelines were kept and (4) whether the effect of subjective judgments on hiring and promotion of minorities, women and older workers was regularly reviewed for compliance with equal opportunity principles.

[61] These issues are affected by the existing regulation in 29 CFR 1625. 7 (d).

[62] The negotiated rulemaking committee concerned with waivers declined to address this issue, as well as the "tender back" issue.

[63] The early Commission decision concerning the nature of EEOC conciliation is discussed in Alfred W. Blumrosen, BLACK EMPLOYMENT AND THE LAW, 89-92 (*Rutgers Univ. Press,* 1971).

[64] Until 1996, there had not been a comprehensive book which explores the extraordinary variety of legal and practical issues involved in planning and executing a reductions in force. Such a book now exists, and should be required reading for government regulators, plaintiffs' lawyers, as well as the employers' bar for whom it is intended. The book is *Downsizing Law and Practice,* by Ethan Lipsig of Paul, Hastings, Janofsky, and Walker, published by the Bureau of National Affairs, 1996.

[65] The pressures to enhance productivity on management personnel who make the discharge decisions are enormous, and may lead them to favor persons more like themselves than either those who arrived recently under the auspices of an affirmative action plan, or those who have been around a long time and are steeped in the "old ways." The subjective judgment process itself is race, gender, and age neutral; the pressures on those who use it may be biased. *See Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988).

The waivers effectively restrict the possibility of class actions in which the various facets of the Plan could be considered together. Thus most litigation becomes an ad hoc attack on a particular personnel decision.

[66] This understanding of the downsizing process is difficult to reach because of the complexity of the downsizing plan, and the relation it develops among various bodies of law. Ruth Blumrosen and I reached this understanding only after teaching two seminars on the downsizing question, and advising in connection with two downsizing litigations, one from the perspective of plaintiffs, and the other from the perspective of the employer.

[67] 5 USC 561 *et seq.*

[68] Bureau of National Affairs, Daily Labor Report, Nov. 11, 1996, pp. AA 1-2, E 5-10.

[69] Kenneth Culp Davis and Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE, 3d Ed, Vol. I, pp. 362-363 (1994).

[70] It is Title II of the Older Worker Benefits Protection Act of 1990, 29 USC Sec. 626 (f).

[71] This analysis assumes that employers will promptly take full advantage of any opportunities created by the Regulation. Their activities in connection with the waiver provisions of OWBPA are illustrative. Employer testimony about waivers before Congress in the 1980s suggested that many of them did not seek waivers in connection with the early retirement or downsizing programs. Once Congress declared that they had such a right, they have proceeded to exercise it fully. Few, if any, downsizing programs now operate without a waiver of federal rights included.

[72] The EEOC regulation 29 CFR 1625.7 (d) refers only to "tests," not to the broader term "selection procedure," which is the language used in the Uniform Guidelines on Employee Selection Procedures. Thus they are at least ambiguous on the question of incorporation of recordkeeping and reporting in connection with reductions in force. The Commentary on the section issued at the time of its adoption, 46 FR 47725, states that the section, "has been rewritten to make it clear that employment criteria that are age neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as business necessity." *See Laugesen v. Anaconda Copper Corp.*, 510 F. 2d 307 (6th Cir. 1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The final interpretation also contains a reference to the Commission's Guidelines on Employee Selection Procedure, 29 CFR Para. 1607.

[73] My view is that the pre-1990 Age Discrimination in Employment Act did not incorporate the disparate impact doctrine. Alfred W. Blumrosen, "Interpreting the ADEA: Intent or Impact." pp. 68-112 in Monte B. Lake, ed., *Age Discrimination in Employment Act, a Compliance and Litigation Manual.* Equal Employment Advisory Council (1982).

The most plausible reading of Title II of OWBPA, in light of the legislative history is that the 1990 Congress expanded the ADEA to encompass disparate impact, at least in connection with reductions in force, and possibly in general. That same year, Congress expressly recognized the disparate impact doctrine in Title VII itself, in the Civil Rights Act of 1990, which was vetoed by President Bush. The information requirements in OWBPA are more consistent with a disparate impact concept of discrimination than with the disparate treatment concept. While *Hazen Paper Co. v. Biggins,* 113 S. Ct. 793 (1993) and *Markham v. Geller,* 451 U.S. 945 (1981) contain statements from individual justices doubting the applicability of the doctrine under the ADEA, both opinions were rendered in reference to the statute as it existed before the OWBPA of 1990.

The EEOC's view of the question in light of the 1990 statutory provision would probably be given *Chevron* deference, if it were stated through notice and comment rulemaking procedures.

[74] There are many other problems with the draft, which will be addressed in a separate memorandum to the EEOC.

[75] The process of development of two major EEOC guidelines, the *Uniform Guidelines on Employee Selection Procedures,* and the Affirmative Action Guidelines is described in Alfred W. Blumrosen, "The Bottom Line in Equal Employment Guidelines: Administering a Polycentric Problem." 33 *Administrative Law Review* 323 (1981). The Uniform Guidelines were far more complicated because there was a decade of earlier regulative efforts, and it was necessary to secure the agreement of several federal agencies.

[76] *See* note 76, *supra.*

[77] There is a suggestion in the Daily Labor Report story concerning the proposed regulation, that this may have been the case. *See* BNA, Daily Labor Report, Oct. 11, 1996, p. AA 1-2.

[78] MIDTERM REPORT, note 1, *supra* p. 108

[79] Oxford memorandum, p. 7, note 44, *supra. See* Alfred W. Blumrosen, Society in Transition I: A Broader Congressional Agenda for Equal Employment, 8 *Yale Law and Policy Review* 257 (1990).

Chapter VIII

Equal Employment Opportunity

by Helen Norton

This paper examines the Clinton Administration's performance during 1995-96 in protecting the civil rights of working Americans. To date, this record remains mixed, marked both by significant victories as well as by disappointments. The Administration's second term offers it the opportunity to build upon some of its more promising beginnings to realize its as-yet-unfulfilled potential in ensuring equal employment opportunity for all.

I. Legislation

A. Legislative developments in the 104th Congress

Affirmative action. A major success of the last two years was the Administration's leadership in fighting back the so-called "Equal Opportunity Act" (also known as the "Dole/Canady" bill). This bill would have outlawed all federal affirmative action programs in employment, education, and contracting, thus threatening our national efforts to end continuing discrimination. To add insult to injury, the Dole/ Canady bill also proposed to carve out gaping new holes in sex discrimination law, allowing women to be excluded from certain jobs altogether based on undefined "privacy" or "national security" concerns. The President's strong defense of the continuing need for affirmative action in his July 1995 "mend it, don't end it" speech, followed by the Administration's consistent and vocal opposition to the Dole/Canady bill, helped stymie all legislative efforts to gut affirmative action in the 104th Congress.

Gay and lesbian employment rights. In a step forward for gay and lesbian civil rights, the Administration's support helped set the stage for a surprisingly close (50-49) September 1996 Senate vote on the Employment Non-Discrimination Act (ENDA), which would ban job discrimination on the basis of sexual orientation. Although the bill was defeated, the closeness of this first-ever vote on the federal employment rights of gays and lesbians creates a helpful climate for future efforts at enactment.

Age Discrimination. On the other hand, the Administration's support for legislation that permanently exempts state and local public safety employers (*i.e.*, police and fire departments) from the Age Discrimination in Employment Act (ADEA) set back anti-discrimination efforts. This new law allows states and localities to impose mandatory retirement on older public safety officers regardless of their ability to perform their jobs. Enactment of this provision in October 1996 permanently removed, for the first time, an entire class of workers from federal guarantees against discrimination.

Minimum wage/Tax on victims' damages. The Administration's support for, and ultimate enactment of, the Small Business Job Protection Act in August 1996 meant a significant increase in the minimum wage — and thus a real victory for low-wage workers who are disproportionately women and people of color. However, the Act also included a little-known provision that imposes, for the first time, a tax on the compensation received (through judicial awards or settlements) by victims of intentional job discrimination and other civil rights violations. This new tax substantially reduces victims' recovery for injuries suffered as a result of discrimination and undermines efforts to settle such claims by raising the cost of settlement for both parties.

B. Recommendations for legislative action in the 105th Congress

The Administration should fill key enforcement positions with individuals who have a demonstrated commitment to civil rights. With Secretary of Labor Robert Reich and Assistant Attorney General for Civil Rights Deval Patrick already announcing their plans to resign, the Administration will have a number of key civil rights leadership positions to fill. One of the major highlights of the first Clinton Administration has been its appointment of individuals with a demonstrated commitment to equal employment opportunity to top enforcement jobs. The Administration should continue to insist on such qualifications as a prerequisite for any such position.

The Administration should continue its vigorous opposition to congressional efforts to gut affirmative action programs. Affirmative action opponents have already announced their plans to reintroduce measures to repeal federal affirmative action programs in the 105th Congress. The Administration's continuing leadership in fighting back any efforts to roll back hard-fought gains in this area will be crucial to the successful defense of these programs. The Administration should thus continue its visible and vocal support for affirmative action as an effective and necessary tool for ending persistent discrimination.

The Clinton Administration and Congress should support increased funding for the EEOC, OFCCP, and other key enforcement agencies. In order to enforce anti-discrimination laws effectively, the agencies charged with equal employment opportunity (EEO) enforcement must receive sufficient appropriations. However, in recent years these agencies have received woefully inadequate funding. At the end of FY 1996, for example, the OFCCP's staffing had dropped to an all-time low of 703 full-time employees, down from a 1978 high of 1,800.[1] Similarly, the EEOC has suffered a staffing cut of more than 15% since FY 1981, while its charge receipts increased by more than 60% over this same period.[2] The Administration's budget requests should reflect that these agencies' critically important enforcement responsibilities require expanded, rather than reduced, investment.

The Administration should articulate and move an affirmative legislative agenda in support of equal employment opportunity. Even though a more conservative Congress will likely require the diversion of considerable effort to defend affirmative action and other civil rights programs from legislative attack, it remains essential that the Administration articulate and move a proactive agenda designed to expand equal employment opportunity for all.

Such an agenda should include expansions to the Family and Medical Leave Act, the Employment Non-Discrimination Act, the Sexual Harassment Protection Act (which would extend anti-harassment protections to independent contractors and others who are not protected by Title VII yet still vulnerable to harassment), the Equal Remedies Act (to ensure that victims of sexual harassment and other forms of intentional discrimination receive full compensation for their injuries), the Civil Rights Procedures Protection Act (to prohibit employers from requiring workers to sign away their right to bring discrimination claims in court), the Fair Pay Act (prohibiting pay disparities based on gender, race, or national origin between jobs that are of equal value), the Sexual Harassment Prevention Act (requiring employers to provide training and other information about workers' right to be free of sexual harassment), and the Contingent Workforce Equity Act (which would extend the full range of fair employment protections to part-time, temporary, seasonal, and other contingent workers who are not covered by current law).

II. The Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) enforces Title VII of the Civil Rights Act of 1964 (as amended), the Equal Pay Act, the Age Discrimination in Employment Act, section 501 of the Rehabilitation Act, and the Americans with Disabilities Act.[3] In addition, under Executive Order 12067, the EEOC is charged with providing leadership and coordination among the federal agencies involved in equal employment opportunity issues.

Today — 30 years after the enactment of the Civil Rights Act of 1964 and the creation of the EEOC — serious allegations of widespread sex discrimination at Mitsubishi and race discrimination at Texaco (to name but two of the most recent incidents) remind us that our nation's promise of equal employment opportunity for all has not yet become reality. The EEOC's effectiveness in enforcing anti-discrimination laws determines the extent to which those guarantees have any real impact on the lives of American workers and their families. And, indeed, for too long under the Reagan and Bush Administrations the Commission failed to fulfill its mandate as the nation's lead EEO enforcement agency.

The Clinton Administration's efforts to revitalize the Commission's performance jumped to a promising start with the adoption of several changes to improve charge processing, reduce the backlog, and establish policy and enforcement priorities. However, the jury is still out on whether these initiatives will ultimately succeed; indeed, the agency's performance to date leaves room for substantial improvement.

A. Policy developments

The EEOC under the Clinton Administration has taken a number of policy positions that promise to improve EEO law enforcement. For example, in a move that will open up important training opportunities for older workers, the Commission in April 1996 reversed its longstanding position that federal age discrimination law does not apply to apprenticeship programs.[4] This change will ensure that apprenticeship programs do not exclude applicants simply because of their age.

Other examples of the Commission's progressive policy positions include those identifying workplace "English-only" requirements as a form of national origin discrimination and employers' mandatory arbitration policies as a violation of workers' right to judicial review of discrimination claims. Other strong EEOC policy statements include its reaffirmation that employment "testers"[5] have legal standing to challenge discrimination and its stand in support of an employer's liability for sexual harassment committed by its supervisory employees.

Moreover, after considerable input from the civil rights community and other public constituents, the Commission finalized its new National Enforcement Plan (NEP) in February 1996. The NEP sets out an agenda that should prove very helpful in identifying priority issues for administrative and litigation enforcement. Indeed, the NEP recognizes the critical importance of a number of key issues in ensuring equal employment opportunity, identifying them as enforcement priorities for the Commission. These priority issues include accent and language discrimination, reasonable accommodation of workers' religious beliefs and workers' disabilities, pay discrimination, glass ceiling discrimination, and double discrimination against women of color, older women, and other members of multiple protected classes.

B. Enforcement Performance

Charge Processing. The EEOC's enforcement performance under the Clinton Administration has been decidedly mixed. The Commission's June 1995 adoption of its new Priority Charge Handling Procedures (PCHP) signaled promising developments. Under this new system, charges are classified into one of three categories: "A" charges — raising national or local enforcement plan priority issues and/or involving charges where discrimination is more likely than not to have occurred — receive priority treatment for investigation and resolution; "B" charges — which require further evidence before a determination can be made — will be investigated as resources permit; and "C" charges are those considered to be so weak as to trigger early dismissal. This system has helped reduce the agency's considerable backlog. One year after implementation of the PCHP, the Commission's inventory had dropped from 111,345 to 85,547.[6] Moreover, the number of cases per investigator dropped significantly from 138 to 109.[7] Indeed, the Commission resolved a record number of charges in FY 1995, and in the first half of 1996 it resolved 23% more charges than it received.[8]

However, the remaining backlog continues to be a source of concern. The average complaint processing time now stands at nearly 13 months[9] — up from the 1980 average of three to six and a half months. Moreover, most of the agency's successful backlog reduction to date seems to be due to the dismissal of weaker "C" charges, rather than the satisfactory resolution of stronger "A" charges.

Perhaps most troubling is the agency's poor record in obtaining remedies for discrimination victims. The agency's settlement rate has plunged to an all-time low of 7%[10], down from a 32% settlement rate in FY 1980. Similarly, its "no-cause" finding rate (the rate at which the EEOC finds that there is no cause to believe that an adverse employment decision was discriminatory) is at a record high of 61.1%[11], up from a 28.5% "no-cause" rate in FY 1980.

Litigation. For years, civil rights advocates have urged the Commission to maximize its limited resources for greater effect by increasing its investment in systemic litigation. Under the Clinton Administration, the Commission's leadership has consistently affirmed its commitment to revitalizing its class-action litigation program by increasing the number of suits to target employer- or industry-wide discrimination that affects large numbers of workers. And, indeed, high-profile cases like those against *Mitsubishi* and *Astra* (both challenging sexual harassment), and *Publix* (challenging sex discrimination in promotion and assignments) exemplify precisely the sort of class litigation that merits the agency's investment.

However, at the same time, the size of the agency's litigation docket has plunged to an all-time low. In FY 1996, the EEOC brought only 160 cases (of which 32 were class actions), down from 374 total cases in 1994 (including 79 class cases), and 324 cases in 1995 (including 78 class cases).[12] The Office of General Counsel has argued that this dwindling docket is a temporary condition attributable to a number of factors — the delay in appointment of Greg Stewart as the new General Counsel until mid-1995, the government shutdowns in the winter of 1995-96, and the lag time awaiting identification of enforcement priorities under the new NEP — and has predicted that these numbers should soon rise significantly. The Commission must closely monitor this situation to ensure that it capitalizes on litigation's effectiveness as an enforcement tool.

And while the Commission has aggressively undertaken a number of important high-profile cases like *Mitsubishi* and others, it stumbled badly in its handling of the *Hooters* case in the winter of 1995-96, where it declined to challenge the restaurant chain's facially sex-segregated hiring practices after Hooters engaged in a highly visible media campaign against the EEOC's involvement. Hooters admittedly and blatantly discriminates on the basis of sex by hiring only women as food servers, claiming that it is selling sex appeal as well as food and that only women are thus qualified for those jobs. This sort of employment decisionmaking steeped in stereotypes about women's role and physical appearance — as opposed to an individual's ability to perform the actual job of serving food — is precisely the sort of discrimination that Title VII prohibits. The Commission's retreat in this area sent the unfortunate message that the agency can be intimidated away from controversial cases.

C. Recommendations for the EEOC

The Commission should restore public confidence in its charge processing system. The Commission needs to follow up on its promising PCHP plan to re-create an agency where individuals can be confident that their charges will be promptly and thoroughly investigated and resolved. For example, the Commission should take steps to ensure that its efforts to reduce the backlog do not generate intake procedures that discourage individuals from filing claims or shortcut fair investigations. Instead, the Commission should use intake as an opportunity to counsel charging parties about the process and their options. Moreover, the Commission should ensure that there are adequate systems in place for counseling charging parties throughout the investigation and determination phases. And it needs to improve its performance in investigating and resolving strong cases as well as dismissing weak ones. Of course, additional appropriations are critically important to improving the agency's work in this area.

The Commission should ensure that any alternative dispute resolution procedures to resolve charges include adequate safeguards to ensure fairness to discrimination victims. In the fall of 1996, the Commission entered into an agreement with the Federal Mediation and Conciliation Service to mediate certain charges. In addition, the October 1996 reauthorization of the Administrative Dispute Resolution Act allows the EEOC to use volunteers to mediate charges. Such ADR programs carry the potential of creating new, quick, and efficient options for resolving charges, but must be properly designed to include adequate safeguards to ensure fairness to charging parties and to protect the agency's mission in vindicating the public interest in stopping and deterring discrimination. For example, participation in mediation must be fully voluntary for both parties; the mediator must have expertise in substantive EEO law; charging parties must have the right to be represented by counsel; any charging party unrepresented by counsel must be given sufficient information about her legal rights and remedies to ensure informed decisionmaking; and mediation outcomes should be monitored to ensure that discrimination victims are properly compensated and violators properly deterred.

The EEOC should work with the OFCCP to develop a Memorandum of Understanding (MOU) that allows the OFCCP to negotiate for damages under the Civil Rights Act of 1991. The enactment of the Civil Rights Act of 1991 enabled victims of intentional discrimination under Title VII and the Americans with Disabilities Act to seek limited compen- satory and punitive damages. Once again, we urge the EEOC and OFCCP to work together to develop a Memorandum of Understanding that designates the OFCCP as the EEOC's agent when it identifies intentional discrimination by federal contractors as part of a compliance review, thus authorizing the OFCCP to negotiate for appropriate damages. Such an MOU would parallel an already-existing agreement between the two agencies with respect to ADA and section 503, and would create an important interagency means of maximizing enforcement resources.

The Commission should take additional concrete action to attack systemic discrimination. The number of class action cases — and cases in general — brought by the Commission fell to an all-time low in FY 1996. Moreover, it's not yet clear what has developed as a result of the Chairman's May 1995 directive encouraging the use of directed investigations and Commissioner's charges to identify systemic cases. The Commission should take more real action to back up its claim of a newfound emphasis on systemic cases. More specifically, in working up such investigations, the Commission should actively use evidence developed by employment "testers" as an additional tool for uncovering systemic discrimination.

III. The Department of Justice

The Civil Rights Division of the Department of Justice has primary responsibility within the federal government for enforcing a range of federal laws banning discrimination on the basis of sex, race, national origin, disability, religion, and age. More specifically, the Civil Rights Division's Employment Litigation Section has the authority to bring suit when it has reason to believe that a state or local government has engaged in a pattern or practice of discrimination or when it has received an individual charge of discrimination by a state or local government on referral from the EEOC. The Section also defends federal agencies that are sued for their enforcement of federal affirmative action programs and EEO laws.

A. Policy developments

Under Assistant Attorney General for Civil Rights Deval Patrick, the Clinton Administration's Department of Justice has consistently championed effective civil rights enforcement — a marked and welcome change from its role during the Reagan and Bush Administrations. Especially important has been the Department's leadership in supporting affirmative action. For example, the Civil Rights Division has vigorously defended a range of federal affirmative action programs from attacks on their constitutionality in the aftermath of the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena.*[13] The Department has also defended longstanding Supreme Court precedent upholding the use of properly designed affirmative action programs in furthering government's compelling interest in educational diversity in litigation involving state universities' use of race or national origin as a factor in choosing among qualified applicants for admission.

Moreover, the Civil Rights Division has helped coordinate the President's post-*Adarand* review to ensure that federal race-based affirmative action programs comply with *Adarand's* requirement that they be narrowly tailored to achieve a compelling government interest. This review has generally found to date that these programs serve a compelling government interest because they remedy ongoing discrimination and are fairly and flexibly designed.

However, the Department's review did result in the suspension of the "rule of two," an important affirmative action tool proven effective in increasing government contracting with qualified minority-owned businesses (under the "rule of two" program, competition for a small number of contracts could be limited to two or more qualified minority contractors). Because the Department offered no substitute program to take its place, suspension of the "rule of two" raises the serious concern that even fewer qualified minority-owned businesses will receive federal contracts.

In general, the Department has used its role as Supreme Court advocate to urge the Court to give life to both the letter and the spirit of anti-discrimination law. For example, the Department took strong positions in support of equal opportunity in cases like *United States v. Virginia*[14] (successfully challenging Virginia Military Institute's refusal to admit qualified women), *Walters v. Metropolitan Education Enterprises, Inc.* (arguing that part-time and hourly workers should generally be included when determining whether an employer is covered by Title VII), and *Robinson v. Shell Oil Co* (arguing that Title VII's protections against retaliation extend to former, as well as current, employees who have complained of unlawful discrimination).[15]

On the other hand, however, the Department of Justice took a position antithetical to the interests of discrimination victims in *Hudson v. Reno*, where it argued (as a defendant employer) before the Sixth Circuit that Title VII's "cap" on compensatory and punitive damages limits a victim's total recovery for an entire lawsuit, regardless of how many statutory violations she suffered. Limiting a victim to a single capped amount per lawsuit — rather than to a cap for each violation suffered — fails to provide full compensation for injuries caused by repeated violations. A single cap would also shield employers from paying for egregious retaliation, since additional acts of discrimination, harassment, or retaliation would not result in any increased liability.

B. Enforcement

The Employment Litigation Section filed complaints in 23 new cases in fiscal years 1995 and 1996, settled 28 cases (both old and new), and faced 31 new defensive cases (largely involving defense of federal affirmative action programs from post-*Adarand* challenges to their constitutionality).[16] Nineteen of the new complaints were generated from referrals from the EEOC (two of these were pattern and practice cases), while the remaining four were triggered by the Department's self-starting pattern and practice authority.[17]

The cases brought and settled by the Employment Litigation Section addressed key enforcement issues — challenging such practices as gender segregation and unfair pay in traditionally male jobs, systemic sexual and racial harassment, and the use of written tests unrelated to job performance that had a disparate impact on people of color. Although the Department engaged in significant litigation activity, its proactive anti-discrimination work was hampered somewhat by its need to divert resources to engage in defensive litigation to protect federal affirmative action programs.

C. Recommendations for the Department of Justice

The Department should continue its spirited defense of affirmative action programs in all arenas and should emphasize women's stake in this debate. As part of this defense, it is essential that the Administration ensure that its legal and policy reviews include an analysis of women's interests in the programs at issue. Although the various documents prepared by the Department to date offer a thorough discussion of race-based programs and their underlying rationale, they too often underplay or altogether omit any discussion of sex-based affirmative action programs.

The Department should continue to assert leadership in articulating, implementing, and coordinating forceful civil rights advocacy by the Clinton Administration. The Department should seize leadership by providing analysis to the Administration on the civil rights ramifications of pending legislation — like so-called welfare reform, education, health care, and job training efforts. It should similarly ensure that the Administration actively promotes an affirmative civil rights legislative agenda as discussed above. Finally, the Civil Rights Division should work with the Department's Civil Division to ensure that the government's legal positions as an employer are consistent with expanding equal employment opportunity.

The Department should continue to develop an aggressive and systematic enforcement agenda that maximizes available resources. The Department should continue to identify key cases against state and local governments that expose systemic discrimination and develop an expansive jurisprudence under the Civil Rights Act of 1991. Areas that merit concentration include "double discrimination" and/or harassment based on both gender as well as race and/or national origin, pay discrimination, and determining compensatory damages for intentional discrimination. Elementary and secondary public school systems may warrant further attention, for example, available data show that although public school teachers are disproportionately women, female teachers make less money and are substantially less likely to be promoted to principal than their male counterparts.[38] In addition, the Department should consider information gleaned by employment "testers" as a tool for uncovering discrimination by state and local governments.

IV. The Office of Federal Contract Compliance Programs

The OFCCP enforces Executive Order 11246, which prohibits discrimination by federal contractors on the basis of sex, race, color, religion, and national origin and requires contractors to take affirmative action to ensure equal employment opportunity. It also enforces section 503 of the Rehabilitation Act (imposing anti-discrimination and affirmative action requirements on federal contractors with respect to qualified individuals with disabilities) and the Vietnam-Era Veterans' Readjustment Assistance Act (imposing anti-discrimination and affirmative requirements on federal contractors with respect to Vietnam-era and special disabled veterans of all wars). Nearly one in four American workers works for an employer covered by the Executive Order. Because the Executive Order provides for proactive reviews of contractors' compliance with EEO laws — rather than merely responding to individual complaints of harassment and other forms of discrimination that often go unreported because of victims' legitimate fears of retaliation — it offers an especially valuable enforcement tool.

A. Policy developments

Like the Department of Justice, the OFCCP under Deputy Assistant Secretary Shirley Wilcher has been a leader in defending affirmative action programs against congressional attack. The agency has been consistently vocal and visible in its education of policymakers about the importance of the Executive Order program as a tool for expanding equal employment opportunity in the federal contractor community.

The OFCCP has also launched long-overdue efforts at regulatory reform — proposing the first updates and revisions to the Executive Order regulations since the Nixon Administration. Although development of the proposed regulations has dragged on longer than expected, the proposed changes significantly improve enforcement of the Executive Order in several ways — *e.g.,* by tightening recordkeeping requirements, allowing the flexible use of a range of compliance review activities to target enforcement resources most efficiently, and making clear the availability of fixed-term debarments as a sanction for noncompliance.

However, the proposed changes include a troubling recommendation to transform the pre-award clearance process (whereby companies seeking government contracts must establish their compliance with the Executive Order's anti-discrimination and affirmative action requirements before the award can be finalized) from a mandatory to a discretionary function threatens to undercut an important enforcement tool.

Finally, the OFCCP has developed a range of creative regional initiatives that explore new methods of effective EEO enforcement. For example, its pilot project using employment testers to identify possible targets for compliance review is a very valuable enforcement tool that should be emulated by other EEO enforcement agencies. It has also engaged in groundbreaking pay discrimination efforts — by conducting compensation reviews as part of its glass ceiling enforcement, the agency has uncovered systemic pay discrimination against qualified women and people of color, generating six-figure settlements for classes of victims. Again, other EEO agencies should learn from this model.

B. Enforcement

Despite the impressive initiatives described above, OFCCP enforcement activity has slowed somewhat — at least in part due to the steady cuts in its staffing levels. For example, the numbers of compliance reviews completed in FY 1996 dropped to 3,476 — the lowest level since FY 1982.[19] Similarly, the number of conciliation agreements declined to 1,682 in FY 1996 — compared to an annual average of 2,400 over the last five years.[20] Systemic enforcement also dropped, as the agency made only 48 affected class findings in FY 1996 (down from an annual average of 102 over the last five years) and filed only 10 administrative complaints through the first three quarters of FY 1996 (down from an annual average of 20 over the preceding five-year period).[21] In addition, after jumping to a quick start under the Clinton Administration by issuing six debarments in 1993-94, the agency failed to issue a single debarment in 1995-96.[22]

C. Recommendations for the OFCCP

The OFCCP should continue its vigorous defense of affirmative action and should resist efforts to undermine the reach of Executive Order. The agency should continue to track the continuing persistence of discrimination and educate policymakers and the public about the importance of the Executive Order program in fighting such ongoing bias. Again, the Administration's leadership in this area will be crucial if these programs are to survive.

The OFCCP should complete comprehensive regulatory reform that maintains and expands the use of effective enforcement tools. As a rule, the agency should use regulatory reform as an opportunity to strengthen its range of effective enforcement tools. For example, it should retain mandatory pre-award reviews. It should explore the development of a broad range of penalties for illegal discrimination by federal contractors, including monetary sanctions and the withholding of progress payments. The agency should finalize regulations requiring annual completion of an affirmative action plan (AAP) summary — this would create a short summary of a contractor's AAP that would allow better targeting of contractors for compliance reviews while reducing recordkeeping for contractors who are in compliance. Finally, the OFCCP should, at long last, update its sex discrimination guidelines to reflect key legal developments of the last 20 years, such as the Pregnancy Discrimination Act, the EEOC's guidelines on sexual harassment, and various Supreme Court decisions.

Endnotes

[1] OFCCP Fact Sheet (October 1996).

[2] U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement* 42-46 (June 1995).

[3] Please note that federal enforcement records on disability rights issues will be covered in other chapters of this Report.

[4] EEOC News Release, "Commission Rescinds Exemption for Apprenticeship Programs Under the Age Discrimination in Employment Act" (April 2, 1996).

[5] Employment "testers" are individuals paired to ensure that they appear identically qualified — *e.g.,* with similar work experiences, background, interviewing skills, and physical demeanor — while differing in their race, gender, or other protected characteristic. Comparing the treatment that the paired individuals receive from prospective employers can be a reliable indication of discrimination.

[6] EEOC Office of Program Operations Report to the Commission (October 22, 1996).

[7] *Id.*

[8] EEOC Chairman Gilbert Casellas, "Accomplishment Report: October 1994-June 1996" (June 1996).

[9] Women Employed, *EEOC Enforcement Statistics* (1996).

[10] *Id.*

[11] *Id.*

[12] EEOC General Counsel C. Gregory Stewart, *Highlights of the General Counsel's Report to the Equal Employment Opportunity Commission on the Implementation of the National Enforcement Plan* (October 22, 1996).

[13] 115 S.Ct. 2097 (1995). In *Adarand,* the Court reaffirmed the constitutionality of properly designed affirmative action, but significantly toughened the standards for evaluating the lawfulness of such federal programs.

[14] 116 S.Ct. 2263 (1996).

[15] Both *Walters* and *Robinson* were pending before the Supreme Court at the time of this writing.

[16] Civil Rights Division, "Employment Litigation Section Program Description and Activities" (October 1996).

[17] *Id.*

[18] *See* National Center for Education Statistics, *The Patterns of Teacher Compensation: Statistical Analysis Report* 23-26 (1996).

[19] Women Employed, *OFCCP Enforcement Statistics* (1996).

[20] *Id.*

[21] *Id.*

[22] *Id.*

Chapter IX

Affirmative Action in Public Contracting: The Record of the Last Two Years

by Sarah C. von der Lippe[1]

Introduction

Since the election there has been a great deal of debate about the type of legacy President Clinton will ultimately leave and the policy issues will command his attention during his second term. In his recent book, *Between Hope and History*, President Clinton himself acknowledges the need for strong leadership in the areas of civil rights and racial discrimination. He writes that

> *Martin Luther King, Jr. said that men hate each other because they fear each other. They fear each other because they don't know each other. They don't know each other because they can't communicate with each other. They can't communicate with each other because they're separated from each other. The sad lesson of our experience is that sometimes we can be standing next to one another and still be separated, miles and miles away in our minds.*
>
> *If we are going to build enduring communities, we have to close that distance. We have to continue to heal the racial divisions that still tear at our nation. We cannot rest until there are no more hate crimes, until there is no more racial violence, and until we have moved beyond those far more subtle but still pervasive racial divisions that keep us from becoming strong communities pulling together as one nation under God. Until we do that, we will not have fulfilled the promise that is America.*[2]

Sadly the President's words are absolutely true. We are still a nation beset by race and gender discrimination and bias-motivated violence.[3] These problems are serious, corrosive, and demand a strong response. By focusing on civil rights in his second term, and especially on the politically contentious issue of affirmative action, President Clinton can banish the accusations that he is a political opportunist. Instead, the President can make a place for himself in the history books as a man with the courage and leadership abilities to address the issues of race and sex discrimination head on, explain and preserve the policy of affirmative action, and in so doing, begin to heal and soothe a nation.

In many ways, the same opportunity is within the grasp of Congress. The 104th Congress has been roundly criticized from both sides of the political spectrum. The left has accused the majority Republican Congress of being too harsh on the nation's most vulnerable citizens and the right has accused it of abandoning its principles in favor of political expediency. The 105th Congress has the opportunity to correct the excesses of the 104th Congress and refocus its attention on those who most need the government's help.

The fact is that the President's support for affirmative action appears to have done little to hurt him electorally. Consequently, the bipartisan proponents of civil rights in the 105th Congress should begin this new session newly emboldened and committed to defending — and perhaps expanding — affirmative action. All supporters of affirmative action now have the chance to reaffirm their commitment to civil rights and racial and gender justice, and make clear that they will not abandon their most basic principles — even in the face of contentious political issues.

One civil rights issue that Mr. Clinton and the Congress should address right away is affirmative action in public contracting. This is true for a number of reasons. First, the greatest attacks on affirmative action by the Supreme Court, embodied in the *City of Richmond v. J.A. Croson Co.*[4] and *Adarand Constructors, Inc. v. Peña*[5] decisions, have come in the area of public contracting. Second, the congressional opponents of affirmative action have apparently come to agree that dismantling affirmative action in the public contracting arena is their most promising plan of attack. The last Congress witnessed two strong efforts — and several other far less energetic efforts — to abolish affirmative efforts in the public contracting arena. Third, while a good deal more research is needed, there is a substantial body of evidence which supports the need for affirmative action in contracting. Finally, there are compelling social policy reasons to preserve and perhaps expand affirmative action in public contracting. Promoting the formation, growth, and prosperity of women-owned and minority-owned businesses may help to provide the influx of capital, development, and jobs that America's cities need. In addition, affirmative action in public contracting may help to mitigate the huge income and wealth gaps that still exist between whites and minorities and between men and women.

This paper gives a brief description and history of affirmative action in contracting, describes the current evidence supporting the need to continue affirmative action, and reviews the recent policies toward affirmative action of the judicial, executive, and legislative branches. Finally, this paper argues that both the President and the Congress must take action to shore up and defend existing affirmative action programs and consider expanding affirmative action efforts in the area of public contracting.

I. The Evolution of Affirmative Action in Public Contracting and Current Challenges

Affirmative action is a well-known and relatively recent public policy tool.[6] The legal parentage of federal affirmative action includes executive orders, statutes, departmental regulations, and court decisions. Most sources credit President Kennedy with first using the term "affirmative action" in the early 1960s.[7] President Johnson, as the initiator of the Labor Department Office of Federal Contract Compliance and the signer of the Civil Rights Act of 1964, did much to give life to Kennedy's vision of legally enforceable rights and furthered the cause of affirmative action in many ways.[8] In the late 1960s, President Johnson turned to affirmative action efforts in federal procurement as part of his response to increasing urban violence and the findings of the Kerner Commission.[9] Ironically, given the current partisan nature of the debate surrounding affirmative action, President Nixon, with the support of many prominent business leaders, expanded these early efforts in his "Philadelphia Plan" which greatly expanded the use of goals and timetables.[10] Moreover, in 1972 President Nixon further advanced the cause of affirmative action by signing amendments which considerably strengthened the Civil Rights Act of 1964.[11]

After rather widespread acceptance of affirmative action by both the legislative and executive branches of the federal government throughout the 1970s, things began to change. Interestingly, the greatest restrictions on affirmative action have come from the judicial branch. The first major Supreme Court challenge to the practice came in 1978 when the Court issued its decision in *Regents of the University of California v. Bakke.*[12] This decision found unconstitutional the admissions policy of the University of California at Davis Medical School and provided legal teeth to the concept of "reverse discrimination." By today's standards, however, the constraints placed upon affirmative action by the Court in *Bakke* were not terribly onerous, and thus affirmative action efforts continued and expanded in many federal, state, and local programs. Two years after *Bakke*, a fractured Supreme Court upheld a federal affirmative action program involving federal procurement in the *Fullilove v. Klutznick*[13] case and a plurality of the Court suggested that affirmative action programs mandated by Congress deserve special deference.

Unfortunately, the Court's favorable stance toward affirmative action in public contracting did not endure. In 1989, the Supreme Court issued its decision in *City of Richmond v. J.A. Croson*[14] and with it, its first serious challenge to affirmative action in public contracting. The decision struck down a public contracting affirmative action program run by the City of Richmond, Virginia which was closely patterned on the federal program upheld by the Court in *Fullilove*. In so doing, the Court held that affirmative action programs based upon race must be subjected to strict constitutional scrutiny. This means that such programs will survive only if they serve a compelling governmental interest and are narrowly tailored to achieve that interest.[15] In 1995, the Court held in *Adarand Constructors, Inc. v. Peña*[16] that strict scrutiny would also apply to federal affirmative action programs — although the Court left open many issues, among them the question raised in *Fullilove* about what deference should be given to Congressionally mandated programs.

Croson and *Adarand* represent the most devastating Supreme Court decisions for affirmative action in procurement and thus merit special consideration. According to these two decisions, a local, state, or federal affirmative action program based on race is subject to the strictest constitutional analysis, the same analysis applied to programs which disadvantage minorities. The Supreme Court has not addressed the issue of what level of scrutiny would be applied to affirmative action programs for women, that is, programs that are gender-conscious as opposed to race-conscious. Most federal courts that have addressed this issue, both before and since *Croson*, have held that affirmative action programs for women should be subjected to intermediate, not strict, scrutiny.[17] While the Court has made clear that strict scrutiny will apply to race-conscious affirmative action programs, exactly what types of evidence and program design are required under these standards are much less clear.

The First Prong: Compelling Interest. The Supreme Court has clearly established several points with respect to the compelling interest prong of the strict scrutiny analysis.[18] First, it is clear that the government has a compelling interest in instituting remedies for current discriminatory practices, or the lingering effects of past discrimination.[19] Moreover the Supreme Court has suggested that governments have the authority to address not only governmental discrimination, but also discrimination by private contractors in which the government is a "passive participant."[20] Second, proof of general "societal discrimination" is not sufficient to support an affirmative action program.[21] Third, the Court has made clear that certain types of statistical evidence are acceptable to prove discrimination in public contracting. Justice O'Connor's opinion in the *Croson* case stated:

> *There is no doubt that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute* prima facie *proof of a pattern or practice of discrimination" under Title VII. But it is equally clear that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."*[22]

Justice O'Connor's opinion also made clear that disparities between the number of minorities in the general population and the number of contracts awarded to minority firms are not sufficient to prove discrimination. Instead the Court held that the correct comparison should be between the number of firms "qualified to undertake prime or subcontracting work in public construction contracts" and the number actually receiving such contracts.[23]

Where the Court ultimately decides to draw the line between using the general population for comparison, on the one hand, and attempting to control for every qualification of minority- and women-owned firms on the other, will have a huge impact on the ability of the government to utilize race-conscious measures to remedy discrimination. Presumably the Court's decision will be affected by the availability of data. As will be discussed further in the next section, currently the data is simply not available to perform statistical analyses which adjust for every type of qualification of firms. Fortunately, however, the Court has hinted that it will not set data requirements at unreasonable levels. A majority of the Court in *Adarand* has rejected the proposition that strict scrutiny is "strict in theory, fatal in fact."[24] It must be assumed then that the Court will not demand disparity statistics which require data that is unavailable or prohibitively expensive to collect. To do otherwise would render the Court's pronouncement in *Adarand* disingenuous.

The Second Prong: Narrow Tailoring. In many ways the second prong of the strict scrutiny test, which requires that affirmative action measures be narrowly tailored to achieve the identified compelling interest, is even less clear. Nevertheless, the *Croson* case and commentary by legal experts provide some insight. There are essentially six separate considerations under the narrow tailoring test.

- First, the programs will be carefully evaluated to ensure that they do not impose too great a burden upon majority contractors.[25] While this component of the second prong was not specifically discussed by the Court in *Croson,* it represents the essence of the narrow tailoring standard.
- Second, courts will examine whether the government adequately considered race-neutral alternatives prior to instituting a race-conscious program.[26]
- Third, goals, or other numerical mechanisms, utilized by the government must be closely tied to the discrimination the government is attempting to redress.[27] This issue raises many of the same issues in play in the first prong of the analysis. For instance, what should be considered the relevant pool of qualified firms? Should the effects of past discrimination be considered in setting numerical goals so that goals are not so low as to be ineffective in providing a remedy?
- Fourth, affirmative action programs should have a clear end point or measurable objective.[28] This may not require a particular date certain at which the program would end, but instead may require that the program be subject to periodic review.[29]
- Fifth, courts will consider the overall scope of the affirmative action program and whether or not the program has a waiver provision.[30]
- Finally, the courts will also be likely to consider the ways in which race is used in the affirmative action program.[31] This issue dates back to the Court's decision in *Bakke*. In that case, Justice Powell, writing for the Court, drew a distinction between affirmative action programs which based decisions solely on race, and those in which race was one of several factors considered.[32] More recently, Justice O'Connor's opinion in *Croson* expressed special concern about programs which make "the color of an applicant's skin the sole relevant consideration."[33]

II. The Available Evidence and the Need for Reasonable Evidentiary Standards

A complete review of the available evidence of discrimination to support federal affirmative action programs in public contracting is far beyond the scope of this paper and, moreover, has been initiated elsewhere.[34] For instance, the Department of Justice has compiled extensive evidence of race discrimination related to federal procurement including: an exhaustive survey of the legislative record of efforts to increase minority participation in federal contracting; an examination of the effects of discrimination on the formation and development of minority businesses, including the effects of discrimination by unions and employers, and by lenders; discrimination in access to contracting markets, including discrimination by prime contractors and private sector customers, discrimination by business networks, and discrimination in bonding and by suppliers; and discrimination in state and local contracting markets. In each of these areas, the Department has collected extensive social science research, anecdotal evidence, and legislative evidence derived from hearings and congressional debates.[35] And of course, all of this is set against a backdrop of staggering evidence of continuing disadvantage for women and minorities on all basic social and economic indicators such as income, wealth, educational achievement, homeownership, and employment.[36]

Still, one very recent report deserves special mention because it deals exclusively with affirmative action in public contracting. In October of 1996, the Urban Institute issued a report entitled *Do Minority Owned Businesses Get a Fair Share of Government Contracts?* This report, based upon 58 "disparity studies" commissioned by various state and local governments in the wake of the *Croson* decision, documents the existence of wide disparities between the share of contract dollars received by minority- and women-owned firms and the share of all firms that are minority- or women-owned.[37] Specifically, the report found that minority firms received only 57 cents for every dollar they would be expected to receive based upon their representation among all available firms. For specific racial groups the disparities were even greater: African American-owned firms received only 49 cents on the dollar, Latino-owned firms received 44 cents on the dollar, Asian American-owned firms received 39 cents on the dollar and Native American-owned firms received 18 cents on the dollar. In addition the report found that women-owned firms received only 29 cents of every dollar they would be expected to receive based upon their representation among all available firms.[38]

The Urban Institute report also found that the disparities between minority- and women-owned firms and majority male-owned firms were greater in areas in which no affirmative action contracting program was in place. For the purposes of this sub-analysis, the authors defined an "affirmative action program" as any program involving mandatory or voluntary numerical goals for prime or subcontractors. When only disparities from areas with no program in place are considered, the percentage of awards to minority-owned business falls from 57% of what would be expected to 45%. For women the awards fall from 29% of what would be expected to 24%. For African Americans the percentages dropped from 49% to 22%, for Latinos the percentage dropped from 44% to 26%, for Asians from 39% to 13%, and for Native Americans from 18% to 4%. These figures are in no way conclusive evidence of what would happen to minority contractors in a particular area if affirmative action programs were removed, but they do suggest that affirmative action programs may reduce disparity.[39]

The Urban Institute report carefully refrains from concluding that the findings of wide disparities constitute conclusive proof of discrimination by state and local officials. The disparity studies used as the basis for the Urban Institute report did not allow sufficient manipulations of the data to determine the cause of the disparities with certainty. The authors simply did not have enough data to perform the detailed analyses necessary to rule out all possible causes of the disparities other than discrimination.[40] Of course, as the study notes, the Supreme Court has not required such detailed analysis.[41] As was stated in the previous section, the *Croson* decision clearly suggested that "gross statistical disparities" will be considered "*prima facie* proof of a pattern or practice of discrimination" in the contracting context, just as such statistics are accepted as proof in the employment discrimination context. What remains to be seen are what types of disparity analyses will be sufficient to prove that what is at play in public and private contracting markets around the country is race and gender discrimination.

In the final analysis, the courts will decide which types of statistical analysis are necessary and probative. In deciding what level of detail to require in disparity analyses, the courts must be realistic about the availability of data. Without a doubt, the most recent decisions of the Supreme Court on the subject of affirmative action in public contracting make clear that statistical evidence will be very important. Nevertheless, the fact is that the data simply may not now be available to conduct certain analyses. In some cases, the data is available but cannot be used because the level of detail required to control for various factors cannot be revealed without risking privacy violations or because the data sample sizes are so small that they do not support detailed analysis. In other cases, experts may not even agree on which factors should be used in the analysis. For instance, there is little agreement as to which factors render a firm qualified to perform government contracting work. To make matters more complex, the characteristics that make a firm qualified may depend upon the type of contracting under discussion. Finally, even if experts agree on which firm characteristics are important in determining whether or not a firm is qualified, the data may not be available to determine which firms have these characteristics and which do not.

All of this leads to the conclusion that the courts should carefully consider the availability of data and the limits of statistical analysis, and set evidentiary requirements accordingly. As stated in the previous section, there is ample reason to believe that the courts will not impose evidentiary burdens that are impossible or prohibitively expensive to meet. Any other course of action by the courts will essentially render meaningless the Supreme Court's promise in *Adarand* that "strict in theory" does not mean "fatal in fact" and would unduly limit the tools available to government officials in their efforts to remedy race and sex discrimination. The Urban Institute report could not, with the data culled from the disparity studies, control for the variables — such as size of firms — that some have suggested would make the relationship between disparity and discrimination more clear. Despite this, the Urban Institute is an example of precisely the sort of statistical analysis that should be considered sufficient by the courts at least until such time as more research is available. Certainly, the Urban Institute report constitutes far stronger evidence than any which has previously been considered by the Supreme Court in a government contracting affirmative action case.

The statistical evidence, which is the primary focus of the Urban Institute report, while compelling in its own right, should clearly be considered in combination with other social science evidence and anecdotal evidence provided by those involved in the contracting process. In addition to documenting wide disparities in state and local contracting, the Urban Institute report reviewed the literature on the various barriers to minority firm formation and to participation in public contracting. The study does not examine the barriers to firm formation by women, although anecdotal evidence contained in the disparity studies upon which the Urban Institute was based reveal that many of the barriers confronted by minority-owned firms are also confronted by women-owned firms. Rather, this portion of the report concentrates primarily on African American- and Latino-owned firms since most of the research has been conducted with respect to these groups.

The study notes that there are several areas in which minorities may confront barriers in their efforts to form businesses. One category of barriers involves minorities' limited financial capital, including their lower income and wealth, and limited access to financial markets. Another area of disadvantage involves minorities' limited social capital, including lack of access to business networks and the relative lack of family members who are self-employed or run a business. Minorities are also disadvantaged in the area of human capital since they tend to have lower levels of educational attainment and less experience in business. The report also notes that minority firms may face limited access to white customers due to discrimination by white customers and residential segregation. In addition, the Urban Institute report notes that there is little empirical support for the proposition advanced by some that the difference in rates of small business formation (self-employment) by African Americans is due to culture or preferences.[42]

With respect to barriers to participation, the individual disparity studies (of which there are more than 100) contain a huge number of anecdotes about race- and gender-based bias in the public and private contracting markets. The Urban Institute report did not analyze this data in any sort of systematic way nor did it attempt to assess the credibility of any particular anecdote. The report did, however, use the anecdotal evidence to identify those barriers to participation identified by women and minorities actually participating in the contracting process. Again, this part of the Urban Institute report did not examine issues which specifically affect women, although the anecdotal evidence in the disparity studies suggests that many of the issues affecting minority-owned firms also affect women-owned firms.

Among the issues identified by the Urban Institute Report at various stages of the contracting process are:

- Barriers During the Project Design Stage:[43]
    - Failure of the government to break down large contracts into smaller components which could increase the participation of smaller minority-owned firms
    - Government or prime contractor efforts to "customize" a contract to intentionally steer it to a particular firm
    - Restricting affirmative action solely to subcontracting and thus limiting the opportunity of minority firms to work as prime contractors
    - Abuse of good faith waivers
    - Inadequate screening for "front" firms (majority firms posing as minority firms)
- Barriers During the Bid Solicitation Stage:[44]
    - Use of closed or private requests for bids
    - Failure to advertise bids in minority media
    - Failure to notify minority firms of bidding opportunities
    - Provision of incomplete bid specification information to minority firms
    - Untimely notification of minority firms of bidding opportunities
- Barriers During the Bid Submission and Evaluation Stage:[45]
    - Discrimination in pricing by suppliers
    - "Bid shopping" (the practice of revealing minority firm bids to majority contractors so that the majority firms can underbid the minority firms)
    - Subjectivity in granting of awards
    - Rebidding or renegotiating a specific contract in order to manipulate the process in favor a particular firm
- Barriers During the Execution of Contract, Monitoring Compliance, and Payment:[46]
    - Exclusion of minority firms by prime contractors after contracts have been awarded.
    - Slow payment of amounts owed to minority firms
    - Project sabotage

III. Presidential Efforts in the Area of Affirmative Action in Public Contracting

President Clinton appears to have taken seriously the evidence supporting the continuing need for affirmative action and has taken at least a strong rhetorical stand against dismantling federal affirmative action programs. In a July 1995 speech the President stated his position:

> *But let me be clear; affirmative action has been good for America.*
>
> *Affirmative action has not always been perfect, and affirmative action should not go on forever. It should be changed now to take care of those things that are wrong and it should be retired when its job is done. I am resolved that that day will come. But the evidence suggests, indeed screams, that that day has not come.*
>
> *The job of ending discrimination in this country is not over. That should not be surprising. We had slavery for centuries before the passage of the 13th, 14th, and 15th Amendments. We waited another hundred years for civil rights legislation. Women have had the vote less than a hundred years …*
>
> *Based on the evidence, the job is not done. So here is what I think we should do. We should affirm the principle of affirmative action and fix the practices. We should have a simple slogan: mend it, but don't end it.*[47]

With these words the President reaffirmed his commitment to the principles of affirmative action, made clear that discrimination is still a problem in America, and made the important point that it was not so very long ago that racial and gender discrimination were sanctioned by American law. In this context, the power and importance of rhetoric should not be underestimated — there are few other issues in America today that so demand the attention of the bully pulpit.

Nor can the power of convictions be discounted. Whatever the evidence to the contrary has been in other realms, it appears that President Clinton is personally committed to the fight for racial justice. This has been confirmed by those who have worked closely with the President on race issues. Harvard law professor and former Special Counsel to the President, Christopher Edley, Jr., who with George Stephanopoulos led the White House review of affirmative action, has written a fascinating book about affirmative action which provides some insight into — among other things — the President's personal feelings about affirmative action. In the book, Professor Edley reveals that top aides eventually abandoned the effort to divine the "best" political position for the President to take on affirmative action, and instead decided that the ultimate position would have to be an "authentic" one honestly reflective of the President's own commitment to the issue.[48] If Professor Edley is correct, then there is good reason to be optimistic about the President's continued support for affirmative action.

Another reason to be optimistic is that, so far, the President has stuck to his guns on this issue at least in terms of rhetoric. Throughout a contentious presidential election in which former Senator Dole and other Republican candidates tried hard to make affirmative action a wedge issue, President Clinton has continued his calls to mend, but not end, the policy. In fact, both Bob Dole and his vice presidential candidate, Jack Kemp, abandoned their longtime support for affirmative action in an attempt to make the practice a divisive campaign issue. President Clinton did not abandon his own support for affirmative action for the sake of scoring political points on the campaign trail. On the other hand, the President did little to move beyond rhetorical support for the practice. The President did state his opposition to the California ballot initiative, Proposition 209, which proposed to end public sector affirmative action in that electorally important state. On the other hand, many supporters of affirmative action were disappointed that the President (and the Democrats in general) did not do more to help to defeat the referendum which ultimately passed despite the President's opposition.

The President's rhetorical support for affirmative action should be applauded. It should also be recognized, however, that his willingness to put his words into action has yet to be tested in any really meaningful way. It is true that the President has instructed the Justice Department to lead a government-wide review of affirmative action as a follow-up to his pronouncement that affirmative action should be mended. This work is currently underway throughout the government and is aimed primarily at ensuring that all federal affirmative action programs are constitutionally defensible. According to the President's July 1995 speech, the Administration intends to ensure that federal affirmative action programs: do not utilize quotas; do not countenance illegal discrimination of any kind, including reverse discrimination; do not provide preferences for people who are not qualified; and are ended when they have accomplished their purpose.[49]

The initial results of this process are the *Proposed Reforms to Affirmative Action in Federal Procurement* published in the Federal Register on May 23, 1996. This extremely dense and substantive piece was written by the Justice Department as a public notice and invitation for reactions and views. The Department is now in the process of reviewing the comments it has received. The proposed reforms involve new tighter certification procedures for socially disadvantaged business (SDB) programs. The reforms also propose establishing benchmark limitations for each industry in which contracting occurs, reflecting the level at which SDBs would be expected to participate in the absence of discrimination. The Justice Department proposes to allow the use of race-conscious measures whenever actual participation of SDBs is below the benchmark limitation. In addition, race-conscious measures will be allowed if the Commerce Department, in consultation with the Small Business Administration, determines that curtailing the use of such measures would substantially reduce SDB participation. Finally, the Justice Department reforms propose that the race-conscious measures (beyond outreach and technical assistance) available to federal agencies be limited to a few mechanisms that the Department has determined are likely to be found to be "narrowly tailored."[50] Overall, these reforms are thoughtful, and probably make a good deal of sense.

In addition to working to reform existing affirmative action programs so that they are defensible under the narrow tailoring demands of strict scrutiny, the Justice Department has also taken decisive steps to defend these programs against attack in the courts. As mentioned above, the Justice Department has put considerable effort into compiling an evidentiary record of race discrimination in an effort to respond to the compelling need prong of the strict scrutiny standard.[51] The Department is still in the process of collecting evidence and information about race discrimination. Hopefully, these efforts will eventually expand to include efforts to compile evidence of sex discrimination as well.

It is important to note that the Clinton Administration has taken two specific actions with respect to affirmative action which are problematic. The first action was to discontinue the use of an affirmative action practice commonly known as the "rule of two" in the Defense Department. Under this practice, if at least two qualified and competitive SDBs were interested in bidding on a particular contract, then that contract was set aside for bidding only by SDBs. The second action the Administration took was to propose a moratorium on the use of set-asides by federal agencies. These actions were likely motivated by good intentions — the desire to preempt a determination by the courts that the practices were unconstitutional. However, in both cases, but especially in the case of the proposed moratorium on the use of set-asides, the Administration may have acted precipitously. These two actions remove policy tools from the hands of federal officials working to remedy discrimination. It is true that a practice such as the "rule of two" should only be used in cases of quite egregious past discrimination or in cases where lesser remedies have failed to bring about a change in discriminatory behavior. But such cases have arisen and will continue to arise in the future and the practice should be used if it is the only appropriate remedy. The proposed moratorium on the use of set-asides is even more problematic since it removes a whole category of affirmative action tools from use by federal officials attempting to battle discrimination. The courts have never held that the use of set-asides is *per se* illegal, and the tool ought to be available for use by federal officials under certain circumstances. Again, the better approach would be to examine whether or not a specific affirmative action tool is appropriately, in a particular circumstance, narrowly tailored.

IV. Legislative Attempts to Repeal Affirmative Action in Public Contracting

If the President deserves high marks for rhetoric and cautious optimism with regard to future action, the 104th Congress — especially its conservative Republican leadership — deserves very low marks for rhetoric and very realistic pessimism with regard to likely future action. Conservative members of the Republican majority in both houses of Congress introduced bills aimed at dismantling affirmative action during the first session of the 104th Congress. These proposals included:

- S. 26(Helms)/S. 318(Helms)[52] which would have amended the Civil Rights Act of 1964 to make affirmative action an unfair labor practice. The effect of this bill would have been to make affirmative action in employment be illegal in both the public and private sectors.
- S. 497 (Helms)/H.R. 1764 (Funderburk) which would have prohibited the federal government from utilizing affirmative action on the basis of race, color, gender, ethnicity, or national origin in public employment, contracting, or benefits.
- H.R. 1840 (Radanovich) which would have prohibited the use of affirmative action based upon race,

sex, color, ethnicity, or national origin in employment, education, and contracting. This bill was not restricted to the federal context.

No official action was taken on any of these bills by either the House or the Senate. However another bill, best known as the "Dole/Canady" bill, received a great deal more attention and was actually considered by a subcommittee of the House Committee on the Judiciary. The bill, numbered S. 1085/H.R. 2128, was misleadingly titled the "Equal Opportunity Act of 1995." It was sponsored by then Senate Majority Leader Dole and Representative Canady and proposed to make any classification based on race, color, national origin, or sex illegal in federal employment and contracting. The bill would even have prohibited the use of race- or gender-conscious remedies in judicial consent decrees involving federal agencies, including the EEOC or the Justice Department. It also would have expanded the instances in which discrimination based on sex would be legal in the federal context.[53] The Dole/Canady bill represented a truly extreme response to concerns about affirmative action and fortunately was not enacted.

During the second session of the 104th Congress, an interesting shift occurred due at least in part to the bipartisan support shown for affirmative action by its proponents.[54] Apparently, opponents of affirmative action decided that attempts to repeal affirmative action across the board were ill-advised. Instead they concentrated on programs dealing solely with public contracting which they appear to have judged to be the most vulnerable and the least politically popular. As a result, Representative Canady prepared, but did not ultimately offer, a substitute to his own bill which would have limited the repeal of affirmative action programs to those affecting public contracting. By this point, Senator Dole had already retired from the Senate to pursue his presidential campaign and thus did not introduce or circulate informally any proposal to narrow his own bill to public contracting.

On a related front, Representative Meyers, Chair of the House Committee on Small Business introduced H.R. 3994, the "Entrepreneur Development Program Act of 1996." This misnamed legislation would have repealed section 8(a) of the Small Business Act, the Minority Small Business and Capital Ownership Program, which is intended to help firms owned by socially and economically disadvantaged individuals — a category which in the case of 8(a) includes a large number of minority contractors, but does not include women — obtain federal contracts. The repeal of this program would do tremendous damage to current federal efforts to remedy current and past discrimination against small minority-owned firms. Fortunately, the bill never progressed beyond the hearing stage.

One other congressional effort also deserves mention because it represents the only positive formal action of the 104th Congress with respect to affirmative action. During the first session of the 104th Congress, as the Senate was considering various appropriations bills, Republican presidential candidate Senator Gramm decided to circumvent the committee system of the Senate altogether by attempting to attach riders to various appropriations bills which proposed to prohibit the agencies funded by the specific appropriations bill from conducting affirmative action programs. The Gramm amendment, which was offered to the Legislative Branch appropriations bill, was defeated by a vote of 36 to 61. Instead, the Senate passed an amendment offered by Democratic Senator Murray which proposed to prohibit the awarding of contracts to unqualified persons, the use of quotas, reverse discrimination, and contracting procedures inconsistent with *Adarand*. The Murray amendment passed by a vote of 84 to 13 but ultimately did not become law.[55] Aside from this one hopeful moment in the Senate, the record of the 104th Congress with respect to affirmative action in contracting is abysmal.

V. Conclusion and Recommendations

Both the Congress and the President must act decisively to address race and sex discrimination. Affirmative action in public contracting makes sense and should not be dismantled. The fact that the courts and conservative Republicans are attacking these programs should only provide the President and congressional supporters of affirmative action with more motivation to fight to preserve this important anti-discrimination tool. For several reasons, the President is well-positioned to take on this task. Mr. Clinton's first tem provides the perfect springboard for him to address the substantive issues involved in the current affirmative action debate. In the last four years the President spoke decisively about the need to defend the underlying purpose of affirmative action while also taking the common sense position that affirmative action should be fair, comply with the law, and be carefully monitored. Already, the various executive branch agencies led by the Department of Justice have begun the process of ensuring that all of the federal affirmative action programs meet the President's demands. Much of the hard work of actually refining and evaluating affirmative action will take place in the second term, and it is during this process that the President's resolve and commitment will be tested — as will the ability of Congress to forego cheap political gamesmanship and seek real solutions to the serious problems of race discrimination.

Perhaps the most important reason that the President should take on the fight to defend and strengthen affirmative action is that he is well qualified for the job. By his own and others' reports, the President cares deeply about the problems of race discrimination and racial disadvantage. He has also been a solid advocate of women's rights. The President's legendary skills as a campaigner and communicator will be tremendously important. The battle for affirmative action will truly be a battle for the hearts and minds of the American people. Most of those who are victims of discrimination, or who work on their behalf, know all too well that discrimination is still widespread and insidious. And yet, many Americans profess that they believe that it is no longer a problem. The President's skills as an orator are sorely needed to help the American public understand that discrimination still exists, is widespread, and is a threat to all of our futures. Finally, the effort to administer and defend affirmative action programs is going to require a good deal of painstaking data collection, research, evaluation, and oversight. The President's patience for detail and minutiae will be critical in this effort.

Doing affirmative action right, and giving it the capacity to withstand the attacks of critics, courts and congressional mischief-makers, will require all of the skills the President has. He must present the evidence to the public and convince Americans that we can be better than we are with the help of affirmative action. He is clearly suited for the task and the need for his leadership could not be greater. All that remains now is for him to summon the courage and conviction to fulfill the promise of his rhetoric with action and begin the process of uniting a nation.

The action implications for the President and the Congress are several:

1. The President and the Congress should seriously consider expanding affirmative action efforts in those areas in which there is the strongest evidence of disadvantage to women- and minority-owned firms due to discrimination.
2. The proposed two year moratorium on set-asides should be abandoned. Instead, the use of set-asides should continue but should be limited to those instances when their use would represent an appropriately narrowly tailored response to identified discrimination.
3. The Congress should abandon all attempts to dismantle affirmative action. The empirical evidence simply does not support repeal and such an action would act merely to limit the choices available to policymakers.
4. The President and the Congress should carefully review the extent of enforcement of existing affirmative action programs. In places where the programs are not vigorously enforced, action should be taken immediately to strengthen enforcement.
5. The President and the Justice Department should continue their efforts to defend existing affirmative action programs from attack in the courts. The Justice Department should also continue the process of collecting and centralizing existing evidence of discrimination. This evidentiary record should be expanded to include discrimination against women.
6. The President and the Congress should join together to improve data collection and research and analysis on public contracting.

Endnotes

[1] I would like to acknowledge Helen Norton, Pamela Loprest, Penda Hair, Michael Epstein, Brian Komar, Catriona MacDonald, Andrea Evans, Stephanie Robinson, and Corrine Yu, all of whom gave generously of their time and expertise while I was preparing this paper.

[2] Clinton, William Jefferson, *Between Hope and History*, 1996, at 130-131.

[3] The FBI has reported that 61% of the nearly 8,000 hate-crime incidents in 1995 were motivated by racial bias. "FBI: Most '95 Hate Crimes Motivated by Racial Bias," *Washington Post*, November 5, 1996, at A12.

[4] 488 U.S. 469 (1989).

[5] 115 S.Ct. 2097 (1995).

[6] I am referring here to public policy efforts actually entitled "affirmative action" which conform to our current understanding of affirmative action. If we define affirmative action more broadly to include any proactive efforts to address racial or gender inequity, then the history of affirmative action is much, much longer and covers many more programs. It might include, for instance, the efforts of the Freedman's Bureau during the Reconstruction period. Even the types of programs we commonly think of as affirmative action — oversight and record keeping aimed at ensuring that women and minorities are not disproportionately denied educational and economic opportunities — began long before the term "affirmative action" was coined. In 1941 President Roosevelt signed Executive Order 8802 which required defense contractors to commit to non-discriminatory employment policies in government funded projects. Bruno, Andorra, *Affirmative Action in Employment*, Congressional Research Service, January 17, 1995, at 3. Despite this, it would be another two decades before the term "affirmative action" was used.

[7] In 1961, President Kennedy signed Executive Order 10925 which used the term "affirmative action." Graham, Hugh Davis, *Origins of Affirmative Action: Civil Rights and the Regulatory State*, ANNALS, American Academy of Political and Social Science, Vol. 523, 1992, at 53-54.

[8] Edley, Christopher, Jr. and George Stephanopoulos, *Affirmative Action Review*, Report to the President, July 19, 1995, at 10-11.

[9] Memorandum produced by the staff of Representative Meyers, Chair of the House Committee on Small Business, summer 1996, at 13.

[10] Communications Consortium and Citizens' Commission on Civil Rights, *A Newsroom Guide to Civil Rights*, 1994, at 52-53.

[11] Edley and Stephanopoulos, at 11.

[12] 438 U.S. 265 (1978).

[13] 448 U.S. 448 (1980).

[14] 488 U.S. 469 (1989).

[15] *Id.* at 505, 508.

[16] 115 S.Ct. 2097 (1995).

[17] Memorandum of Walter Dellinger, June 28, 1995, Appendix B of Affirmative Action Review, Report to the President, by George Stephanopoulos and Christopher Edley, Jr., July 19, 1995 (hereinafter, "Dellinger Memo"), at 8.

[18] The Court left open several questions about the compelling interest test. First, the issue raised in *Fullilove* of what deference should be accorded to Congressional findings and enactments with respect to race discrimination is yet to be decided. Second, the Court did not really address the issue of "but for" discrimination — the argument that the current pool of minority firms is artificially small because of past discrimination.

Despite this, several lower court post-*Croson* decisions have found evidence of "but for" discrimination to be probative. Dellinger Memo, at 12. Third, the Court did not make clear what weight should be given to anecdotal evidence of discrimination in contracting.

[19] 488 U.S. at 491-492. *See also* Dellinger Memo, at 10.

[20] The portion of Justice O'Connor's *Croson* opinion which discussed this issue did not command a majority of the Court, yet it is likely that a majority of the Court would support the passive participation rationale for affirmative action. Justice O'Connor describes the issue this way:

> *Thus, if a city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice. Id.* at 492.

[21] *Id*. at 505.

[22] 488 U.S. at 501 (internal citations omitted).

[23] *Id.* at 502.

[24] Dellinger memo at 1, citing *Adarand,* U.S.L.W. at 4533, 4542 and 4543.

[25] Dellinger Memo at 19.

[26] 488 U.S. at 507.

[27] 488 U.S. at 507-508.

[28] *Id.* at 498 and 510.

[29] Dellinger Memo at 26-27.

[30] 488 U.S. at 508.

[31] *Id.* at 19.

[32] 438 U.S. at 315, 317; Dellinger Memo at 23-26.

[33] 488 U.S. at 508.

[34] While here have been a number of efforts to survey the evidence of discrimination, two deserve special mention. The Department of Justice conducted a preliminary review of the evidence of discrimination supporting a finding that the federal government has a compelling interest in remedying race-based discrimination. This review was appended to the May 23, 1996 announcement in the Federal Register entitled "Proposed Reforms to Affirmative Action in Federal Procurement" at 26050-26063. The Report to the President authored by Christopher Edley, Jr. and George Stephanopolous entitled *Affirmative Action Review* and released on July 19, 1995 contains a far more limited summary of evidence warranting affirmative action at 20-25. In addition to these sources, there have been many Congressional hearings on the subject of affirmative action, the written records of which contain a great deal of evidence of discrimination. A partial list of these hearings is included in the notes to evidentiary review conducted by the Department of Justice and printed in the Federal Register at 26051-26052.

[35] 61 Fed. Reg. at 26050-26063.

[36] *See, e.g.*, Edley, at 41-52.

[37] Enchautegui, Maria E., Michael Fix, Pamela Loprest, Sarah von der Lippe, Douglas Wissoker, *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?,* October 1996, (hereinafter, "Enchautegui *et al.*") at Figures 1 and 2 of the Executive Summary.

[38] *Id.* at vi.

[39] *Id.* at 25-26, and Table II.6.

[40] *Id.* at 29-31.

[41] *Id.* at 30-31.

[42] *Id.* at 35-44.

[43] *Id.* at 46.

[44] *Id.* at 46-48.

[45] *Id.* at 48.

[46] *Id.* at 50-51.

[47] Speech by President Clinton, at the National Archives, July 19, 1995.

[48] Edley, Christopher, Jr., *Not All Black and White: Affirmative Action and American Values,* 1996, at 14.

[49] *Id.*

[50] 61 Fed. Reg. at 26042-26050.

[51] *Id.* at 26050-26063.

[52] Both bill numbers refer to identical pieces of legislation as the result of a particular parliamentary maneuver. These bills ordinarily would have been referred to the U.S. Senate Committee on Labor and Human Resources which, during the 104th Congress was chaired by Senator Nancy Kassebaum and had as its ranking member Senator Edward M. Kennedy. Apparently Senator Helms preferred to avoid referral to that committee. He therefore introduced two copies of the same bill so that he could have one bill placed directly on the legislative calendar and allow the other to be referred to committee. Under the current practices of the Senate, however, any bill on the calendar can be called up only by the majority leader. It is extremely rare for a majority leader to call up legislation in this manner, thus bypassing the committee system, and it did not happen in this case.

[53] *See, e.g.,* fact sheet, *How the Dole/Canady "Equal Opportunity Act" Would Legalize Sex Discrimination,* issued by the National Women's Law Center, March 1996.

[54] Lori Nitschke, "Congress' Zeal to End Affirmative Action Wanes," *CQ Monitor,* August 26, 1996, at 5.

[55] Congressional Research Service Information Pack on Affirmative Action, Winter 1995.

Chapter X

Building Bridges – or Barriers? Ending Welfare As We Know It

The Clinton Administration's Record on Welfare Reform

by Jocelyn Frye, Joan Entmacher, and Susannah Baruch

Introduction

During the 1992 campaign, candidate Bill Clinton promised repeatedly to "end welfare as we know it." On August 22, 1996, President Bill Clinton did that — and more. After vetoing a substantially similar bill submitted to him earlier in the 104th Congress[1], the President signed a bill that turns back the clock on this country's struggle for equal opportunity and social justice. The new welfare law, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)(Public Law 104-193), slashes safety net programs and makes it more difficult for families to escape poverty and become self-sufficient.

The signing of the PRWORA by the President abolished the Aid to Families with Dependent Children program (AFDC), the 61-year-old federal–state program that guaranteed assistance to eligible needy families. The PRWORA replaces AFDC with block grants to the states under which funding is essentially fixed and no individual or family is entitled to assistance — even if they meet all eligibility requirements and comply with all rules. The PRWORA restricts access to education and job training, eliminates the guarantee of child care for recipients required to work and of transitional child care for parents leaving welfare for work, and repeals explicit anti-discrimination and labor law protections for those required to work that were part of AFDC.

The PRWORA also cuts deeply into other safety net programs including Food Stamps, child nutrition programs, and the Supplemental Security Income (SSI) program for low-income families with disabled children. In addition, the PRWORA bars most *legal* immigrants from receiving many forms of federal assistance. And the PRWORA cuts 15% from the Social Services Block Grant, which states use to provide a range of services to families, including protective services for children, foster care and adoption assistance, child care, and services for people with disabilities.

On the positive side, the law does include extensive child support enforcement reforms which should improve paternity establishment and child support collections. However, even in the child support area, the law creates new risks for families receiving public assistance. States will be able to impose stricter requirements for "cooperation" in child support enforcement as a condition of receiving public assistance. And if a mother is unable to meet the new definition of cooperation, without "good cause" as defined by the states, assistance to the entire family may be cut off. The law also eliminates the requirement that states give back to families receiving assistance the first $50 of child support collected (although the law does increase the child support arrears for families leaving public assistance). The PRWORA also provides more money for child care than probably would have been spent under the old law. However, it eliminates previously open-ended federal funding for some child care programs. And the law's work requirements also create an expanded need for child care resources which it fails to meet.

Before the bill was signed, the Urban Institute estimated that it[2] would push 2.6 million more people, including 1.1 million additional children, into poverty.[3] The Center on Budget and Policy Priorities concluded, "No piece of legislation in U.S. history has increased the severity of child poverty so sharply."[4]

I. History

The PRWORA was developed by the Republican leadership of the 104th Congress. But the 1992 Clinton campaign, with its rhetoric of "end welfare as we know it" and "two years and you're off" set the stage for a harsher and more punitive welfare debate. As Daniel Patrick Moynihan warned even before the 1994 elections changed the character of Congress:

> *You let loose a lot of forces when you say, 'End welfare as we know it,' which is why I never said any such thing ... We may look back and say, 'What in the name of God have we done?'*[5]

In June 1993, the President appointed a task force headed by David T. Ellwood, Mary Jo Bane, and Bruce Reed to develop a welfare reform plan. While the task force worked, the Administration pursued another part of its welfare strategy, "to make work pay." President Clinton deserves much credit for significantly expanding the Earned Income Tax Credit (EITC), a refundable tax credit that assists low wage workers and their families, in his first budget. The Administration also made universal health coverage its first priority, recognizing that the lack of health insurance in low wage jobs was — and is — a major barrier to moving successfully from welfare to work. Unfortunately, this effort failed.[6]

For a year the welfare reform task force worked, consulting extensively with individuals, organizations, and public officials. The result was the Administration's Work and Responsibility Act (WRA), which was introduced in Congress in June 1994. The WRA, unlike the PRWORA, retained the basic federal–state financing partnership, and the guarantee of assistance to eligible people complying with program requirements. But in some respects, the Clinton welfare plan pointed the way toward the PRWORA. The new program it proposed phasing in would restrict access to education and training programs necessary for many parents to find a family-supporting job, emphasizing instead rapid placement in any job. And it would have established a two-year lifetime limit on cash assistance, to be followed by work. However, several features of the Clinton plan mitigated the harshness of the proposed two year limit, and distinguish the Clinton plan from the PRWORA.

Under the proposed WRA, individuals who could not find jobs after two years would be guaranteed a WORK placement, and related child care and supportive services. In addition, months in which adult recipients — almost all of whom are single parents — were working an average of 20 hours per week (30 at state option), but were still poor enough to need assistance, would not be counted against the time limit. The clock would not run until the parent turned 18. And individuals who left welfare for extended periods of work — as many recipients do — could earn back eligibility for some additional benefits in the event of another crisis, just as workers do in the Unemployment Insurance system. Finally, the Clinton plan recognized the fact that a program that put recipients to work, with the services they needed to work and meet their family responsibilities, would cost more, at least in the short run, than traditional welfare. It also recognized that implementing these changes would be an administrative challenge for the states. So the proposal called for the new system to be phased in, starting with the youngest parents.

In addition, the Clinton welfare proposal would have given states more flexibility to administer their AFDC programs: both the flexibility to impose new requirements, new restrictions, and harsher sanctions on recipients and their families, and the flexibility to create positive incentives, by increasing the amount of earnings and savings recipients were allowed to keep. It also included extensive child support enforcement reforms, many of which were included in the PRWORA; initiatives to prevent teen pregnancy; guaranteed child care for families receiving assistance while working or in education and training, and a year of transitional child care; and increased child care funding for programs serving other low income families.

The Clinton welfare bill was introduced in Congress as the debate over health care reform was reaching its peak, and just four months before the Congressional elections. It received relatively little attention, and did not emerge from committee in either house.

In November 1994, Republicans won a majority in both houses of Congress. The Clinton Administration did not submit a welfare bill to the 104th Congress. However, it helped shape the debate in other ways: through the President's statements on welfare legislation, and the Administration's policy of granting states waivers of important requirements of the AFDC law.

For example, the Administration granted waivers that allowed states to deny AFDC benefits for newborns, depending on the mother's AFDC status when the child was conceived or born. The Administration also allowed states to impose time limits on assistance. However, waivers would not be granted unless the state agreed, in cases where the adult has complied with program rules but has been unable to attain employment despite her best efforts, either to continue assistance beyond the time limit or allow participation in a work program.[7]

As Douglas Besharov of the American Enterprise Institute observed in June 1996, through these waivers, the Clinton Administration had effectively ended the welfare entitlement and "welfare as we know it."[8] And the conservative Besharov posed the following questions:

> *What does it mean to be unable to work "through no fault of the individual"? Does it mean that welfare mothers must leave their children with relatives, must work at minimum wage without medical benefits, must spend many hours traveling to a low-paid job? How are such crucial decisions to be made? And by whom? Anyone who, like this old veteran of the civil rights struggles, remembers when racial minorities were routinely denied welfare or hassled about staying on will wish that such issues had been more throughly addressed.*

These issues were not fully addressed in the waivers granted by the Clinton Administration[9] — but they received even less attention in the PRWORA.

Civil rights and other groups had concerns about the Clinton welfare plan and the Clinton welfare waiver policy. However, the WRA at least recognized some of the tough issues. The Administration at that time seemed to understand that real welfare reform cost more, not less, in the short run; that parents must have child care and other services to be able to work; and that even for those who tried their best, jobs might not be available. Nevertheless, the Congress passed and the President signed the PRWORA, which reflects a very different set of principles.

II. Key Provisions in the Welfare Law

The new welfare law drastically changes the delivery and scope of welfare benefits and services for families in need. This section focuses on several changes that will have a particular impact on how welfare recipients are treated, and their ability to find work and leave welfare permanently.

A. Due process and civil rights protections

The courts have made clear that welfare recipients are entitled to due process and fair treatment. In the landmark case *Goldberg v. Kelly*[10], for example, the Supreme Court stated that the entitlement to assistance guaranteed welfare recipients due process with a right to a fair hearing before their benefits could be terminated. By eliminating the entitlement, however, the PRWORA leaves unanswered the question of what due process and civil rights protections are available for welfare recipients.

1. **The Loss of the Entitlement and the Move to Block Grants.**

No change in the welfare law is more significant, or fundamental, than the elimination of the entitlement to assistance and the creation of welfare block grants. The entitlement to assistance — a provision in the prior welfare law which guaranteed assistance to families in need — was the core principle underlying the prior law to ensure that all states provided eligible families with a minimum level of assistance and, thus, preserved a safety net for low-income families.[11] The PRWORA, however, strips away the entitlement and replaces it with the Temporary Assistance to Needy Families (TANF) block grant program, a system of block grants to states.[12] Under TANF, states will receive a sum of money, based on what they received from the federal government for AFDC, Emergency Assistance, and JOBS in the past.[13] And, states can reduce their own spending for income and work programs by 20-25% percent from past levels and still qualify for their full allocation under the block grant.

The TANF block grant guarantees assistance to no individual or family. States are generally free to set eligibility rules and assistance levels, but are not required to provide assistance even to those meeting the states' requirements. The TANF block grant does, however, bar states from using TANF funds to assist certain families and individuals. For example, states may not use TANF funds to assist any family that includes an adult who has received assistance under TANF for 60 months, subject to a 20% "hardship exception." They may not even use TANF funds to provide vouchers for children's needs if a parent cannot find work.[14] TANF also limits the federal government's enforcement and regulatory role, thus inhibiting the government's ability to require states to meet certain minimum standards for how services are delivered and how welfare recipients are treated.

Ending the entitlement to assistance has important implications for civil rights enforcement. States and/or agencies will have wide latitude to decide who gets services — and while some states may choose to serve all eligible families, others may make arbitrary, inconsistent, and/or discriminatory decisions about whom to serve. Families who are otherwise eligible may still be denied services if, for example, an agency has only a limited number of employment slots or if a program becomes too expensive to operate. States may choose to use different rules in different counties, thus, applying one set of rules to one population and another set of rules to another population.[15] In short, the loss of the entitlement, and the failure to include meaningful safeguards and accountability, not only removes the guarantee that needy families will receive minimal benefits; it also opens the door to discriminatory, arbitrary decisionmaking about who will and who will not receive vital services, regardless of need.

2. Inadequate Civil Rights Protections.[16]

The PRWORA says little about the rights of welfare families and imposes few obligations on states. But, there are several key provisions that will have a particular impact on the civil rights protections for welfare families.

a. Section 402 and "Fair and Equitable Treatment"

Under TANF's section 402, which describes the required components of the state plans, each state's plan must

> *set forth objective criteria for the delivery of benefits and the determination of eligibility and for fair and equitable treatment, including an explanation of how the State will provide opportunities for recipients who have been adversely affected to be heard in a State administrative or appeal process.*[17]

By including a "fair and equitable treatment" component in the state plan requirements, the new law acknowledges the importance of ensuring that welfare recipients are treated fairly and can challenge discriminatory or unfair conduct. But, the provision is only a small — and unfortunately incomplete — step toward accomplishing these goals.

First, the provision is unclear and open to a wide range of interpretations. Some states may interpret the provision to require a full explanation of their rules and procedures, other states may simply state that their rules and procedures will be "fair and equitable" without any elaboration.[18] Second, although states must include a response to the provision in their plans, HHS has no authority to approve or disapprove state plans under TANF; it merely decides if the plans are "complete." Thus, HHS has been reluctant to evaluate the adequacy of the rules, procedures, and objective criteria described in each state's response. Some states may choose to retain the rules and procedures required under prior law,[19] others may choose to weaken their rules and procedures and limit the ability of welfare recipients to challenge unfair conduct, even if such changes are inconsistent with well-settled Supreme Court precedent.[20] Thus, it will be difficult, under TANF, to ensure that the rules and process developed by each state are truly fair and equitable. Third, without clear rules and procedures that apply to all welfare recipients, the level of fair treatment for welfare recipients will vary from state to state with no consistency or uniformity. Fourth, even if the rules developed by a state are adequate, there is no specific penalty if a state does not comply with its own rules. And, finally, the provision does not include a state or federal enforcement mechanism to enable the government to hold state agencies or localities accountable for unfair treatment and ensure compliance with the law. These flaws may sharply undercut the potentially positive impact of the provision, and undermine the goal of fair treatment and basic civil rights protections for welfare recipients.

b. Section 417 — Limitation on Federal Authority

TANF's section 417 imposes new limits on federal authority by stating:

> *No officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part.*

This provision limits the ability of the federal government to set standards for the operation of state welfare programs. However, despite this limitation, the PRWORA makes clear that block grant funds should not be used in a discriminatory manner, specifically referencing several anti-discrimination laws historically used in the welfare context to prohibit discrimination in federally funded programs (see discussion below of section 408c). Federal agencies must not be discouraged by the language of section 417 from working proactively to seek compliance with these and other civil rights and employment laws.

c. Section 408c — Nondiscrimination

Section 408c of TANF states that TANF-funded programs or activities are covered by the Age Discrimination Act of 1975, section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, and Title VI of the Civil Rights Act of 1964.[21] This provision makes clear that the TANF block grants and their funded programs or activities remain covered by the anti-discrimination laws historically enforced by HHS in the welfare context. Unfortunately, there is no general prohibition against sex discrimination in federally funded programs. And the PRWORA does not make clear that other laws that do prohibit sex discrimination, such as Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, also apply. A woman who is sexually harassed while working in a workfare job, or a woman who is excluded from a particular education/training program because she is female is no less entitled to the protection of the laws simply because she is a welfare recipient. The new welfare law should have made this principle clear and unequivocal.

d. Repealing Important Civil Rights and Worker Protections

Beyond the inadequacies of the PRWORA's civil rights protections, the new law actually repeals important anti-discrimination protections. Gone, for example, is the Job Opportunities and Basic Skills Training Program (JOBS) which included a comprehensive nondiscrimination provision to prohibit discrimination against participants on the basis of race, sex, national origin, religion, age, or handicapping condition.[22] JOBS also required agencies to consider a range of factors for each JOBS participant, including physical capacity, family responsibilities, and child care and supportive service needs, in making program assignments.[23] Thus, participants with unique problems, such as a physical disability or the lack of child care, would not be unfairly penalized and lose vital benefits. Retaining the JOBS anti-discrimination provision would have provided some explicit legal protections for work program participants under the PRWORA's new work requirements. The elimination of JOBS also means the disappearance of its minimum wage protections. Under the prior law, participants in JOBS work supplementation programs received the minimum wage — their total grant amount was divided by the state or federal minimum wage to determine the number of hours of work required in a particular program. The PRWORA requires a minimum number of hours of work of most participants, regardless of how much they get paid. As a result, welfare recipients are relegated to a new sub-class of low-wage labor, earning well below the wages needed to make ends meet.

B. Work requirements, education, and training

Despite the purported goal of moving welfare recipients from welfare to work, the PRWORA eliminates separate funding for education and training programs targeted at welfare recipients and, instead, requires states to have a certain percentage of their welfare population working. In FY 1997, for example, at least 25% of all families receiving welfare benefits and 75% of all two-parent families receiving welfare benefits in each state[24] must participate in certain types of work activities.[25] The work participation rates will rise gradually over the coming years up to a maximum 50% work participation rate for all families and a maximum 90% work participation rate for two-parent families (Table 1).[26] States that fail to meet the minimum work participation requirement risk incurring serious financial penalties — grants to states can be reduced by 5% for failure to achieve the work requirements.[27] If states fail to meet these requirements in consecutive years, the penalties can escalate and states can lose up to 21% of their overall grant.[28]

Table 1

	FY1997	FY1998	FY1999	FY2000	FY2001	FY2002
work particip. % for all families	25%	30%	35%	40%	45%	50%
work particip. % for two-parent families	75%	75%	90%	90%	90%	90%

To be considered participating in work under the new law, welfare recipients must participate in specified work activities[29] (Table 2) for a minimum number of hours (Table 3).

Table 2

Authorized Work Activities	**Limits On Participation in Activity**
1. unsubsidized employment	None.
2. subsidized private sector employment	None.
3. subsidized public sector employment	None.
4. work experience (including work associated with the refurbishing of publicly assisted housing).	Individual can participate in activity if sufficient private sector employment is not available.
5. on-the-job training	None.
6. job search and job readiness assistance	Counts as work for only 6 weeks (or 12 weeks in states where unemployment rate is 50% greater than the U.S. rate). After 4 consecutive weeks, activities cannot count as work for the immediately following week. Participation in such activities for 3 or 4 days counts as an entire week of participation only once.
7. community service programs	None.
8. vocational education training	Participation cannot exceed 12 months for any individual. No more than 20% of all families (and all two-parent families) in a state can meet work requirement by participating in voc. ed. training, or by having satisfactory school attendance (if teen parent).
9. job skills training directly related to employment	Participation does not count toward the minimum hours requirements.
10. education directly related to employment (in the case of a recipient who has not received a high school diploma or a certificate of high school equivalency)	Participation does not count toward the minimum hours requirements unless individual is a single parent under 20 years of age (subject to 20% cap above).
11. satisfactory attendance at secondary school (or GED classes) (in case of recipient who has not completed secondary school or received such a certificate)	Participation does not count toward the minimum hours requirements unless individual is a single parent under 20 years of age (subject to 20% cap above).
12. provision child care services to an individual who is participating in a community service program.	None.

Again, there are different rules for different groups of welfare recipients — the requirement for the whole caseload ("all families") is different from the work requirement for the subset of two-parent families. In all families, participants must work at least 20 hours in certain authorized work activities (Table 2). In two-parent families, participants must work at least 35 hours, spending 30 of those hours in certain authorized work activities (Table 2). In two-parent families that get federally funded child care, the spouse also must work at least 20 hours in unsubsidized employment, subsidized private or public sector employment, work experience, on-the-job training, or community service programs, unless the spouse is disabled or caring for a disabled child. If the head of a family's household is under 20 years of age, that person is considered to be engaged in work for the month if (i) the recipient maintains satisfactory attendance in school, or (ii) the recipient participates in education directly related to employment for at least 20 hours per week (in 1997 and 1998, 25 hours in 1999, and 30 hours in 2000 or years thereafter).[30] And, for purposes of calculating the monthly participation rates for all families, a parent in a one-parent family whose child is not yet six years of age is deemed to be engaged in work for the month if the parent works an average of 20 hours per week during that month.[31] Participants who do not comply with the work requirements can have their benefits reduced or terminated.[32]

Table 3

Required Hours of Work	FY1997	FY1998	FY1999	FY2000
minimum number of hours for all families	20hrs	20hrs	25hrs	30hrs
min. hrs (for all families) that must be spent in specific work activities	20hrs	20hrs	20hrs	20hrs
minimum number of hours for two-parent families	35hrs	35hrs	35hrs	35hrs
min. hrs (for two-parent families) that must be spent in specific work activities	30hrs	30hrs	30hrs	30hrs

The PRWORA's strict work requirements ignore the reality of many welfare recipients' personal experiences. Many welfare recipients have worked or are looking for work, but cannot secure permanent employment because they need certain skills or levels of education. With the PRWORA's severe funding cuts, however, states that want to develop quality education and job training programs, including programs that train women for higher wage, nontraditional careers, will face considerable financial constraints that may undermine program availability, quality, and scope. In addition to these funding constraints, the PRWORA actually limits participation in education and job training programs. TANF arbitrarily caps at 20% the percentage of a state's caseload that can participate in vocational education training[33] and satisfy the work requirements imposed by the new law.[34] Individuals who need to build certain skills or increase their level of education may not be able to participate in a program because their state has reached the 20% cap. TANF also limits the length of time individuals can participate in vocational education training to 12 months.[35] As a result, individuals who need the most help, including participants with certain learning disabilities, may not be able to participate in a program for its full duration.

Beyond the limits to vocational education, TANF restricts the types of work activities that can count toward the requirement to work a minimum number of hours. Individuals who participate in job skills training programs directly related to employment, for example, cannot count that participation toward the minimum hours requirement (Table 2).[36] Welfare recipients who want to acquire specific skills for a job may, instead, have to spend most of their time participating in other, less useful activities just to meet their minimum hours obligations. While better skills and higher educational attainment may be the critical factor to finding a job, the new law will make it harder for many welfare recipients to participate in these much-needed programs.

In addition to these provisions, each state plan must explain how it will ensure that individuals who are ready to go to work do so within two years. There is no penalty, however, if a state does not comply.

Also, within one year of the law's effective date, states must require parents to engage in community service if they are not working after receiving assistance for two months. States can opt out of this provision and there is no penalty identified for noncompliance.

C. Arbitrary time limits on assistance

The law prohibits states from ever using TANF funds to assist any family that includes an adult who has received assistance under TANF for 60 months in her or his lifetime. States may exempt families from the time limit for hardship, but the number is arbitrarily limited to 20% of the caseload. Unless states are willing to use their own funds to provide assistance, families with the greatest needs may be cut off because the "hardship quota" has been filled.

Months in which an individual receives any assistance under TANF count against the time limit: a small cash benefit to supplement a low wage job; transportation vouchers; child care, if it is funded by TANF and not another state or federal program. And once the 60-month time limit is reached by an adult in the family, no form of assistance under TANF may be given to any family member, forever. If an adult is ready and willing to work, but has reached the time limit, states cannot use TANF funds to fund a work placement; moreover, states cannot use TANF funds to provide vouchers to meet the children's needs.

D. Eliminating the child care guarantee

The PRWORA sets strict work participation requirements. But for parents to be able to work, they must have child care. However, the PRWORA repeals the guarantee that parents receiving assistance, who also need child care in order to participate in required work, education, or training will receive it. It also repeals the guarantee of a year of transitional child care assistance for families that leave welfare for work.

The PRWORA does prohibit states from formally sanctioning a single parent for failing to work if she cannot find child care for a child under age six. However, she is disadvantaged in that she does not receive a reprieve from the 60-month time limit on benefits; the clock keeps ticking. Parents with children age six and older can be immediately cut off from benefits even if there is no available child care during the hours they can find work. Parents may be forced to choose between leaving their young children unsupervised and working to retain minimal benefits.

The law also restructures child care programs. A new Child Care and Development Block Grant replaces two child care programs that formerly had open-ended funding — the program that funded child care for AFDC parents and AFDC parents leaving welfare for work — and the "at risk" child care program for poor families at risk of going on welfare. With the PRWORA's work requirements increasing the need for child care, the new law sets up a potentially painful competition for scarce child care dollars.[37]

E. Cuts in assistance for poor disabled children[38]

The Supplemental Security Income program provides cash assistance to poor families caring for disabled children. The PWRORA establishes a new, stricter standard for children to qualify for SSI. It eliminates the "comparable severity" standard, which previously required a process for evaluating children's disabilities comparable to that used for adults, and the requirement for an "individualized functional assessment." The PRWORA also eliminates references to "maladaptive behavior."

The children most likely to lose benefits are those suffering from multiple disabilities, no single one of which is severe enough to meet the new standard: for example, children with moderate mental retardation and moderate cerebral palsy. Children with serious mental, emotional, and behavioral disorders are also likely to be disqualified.[39] The Congressional Budget Office estimated that by 2002, approximately 315,000 children — 22% of the children who would have qualified under the old law — will be denied assistance. However, the impact of the law will depend on how the Social Security Administration interprets and applies the new standard.

F. Cuts in nutrition programs[40]

About half of the cuts in the "welfare" bill come from the Food Stamp program. Benefits were cut across the board; when fully implemented, the average Food Stamp benefit level will shrink to 66 cents per person per meal. About two-thirds of the benefit reductions will be borne by families with children.

The school lunch program was the focus of much political attention, and it emerged virtually unscathed. However, there were cuts in the less visible Child and Adult Care Food Program, which supports meals for children in child care centers and family day care homes, and the Summer Food Service Program for Children, which provides meals to children in low income areas during the summer.

For some groups, the PRWORA eliminates the food safety net altogether. Most legal immigrants and their families were made ineligible for food stamps until they become citizens. Unemployed adults age 18 to 50 who are not disabled or caring for minor children will be limited to three months of benefits in a 36-month period unless they can find a half-time job or a workfare slot, or live in an area of high unemployment area for which the requirement has been waived. However, only about 10 states operate Food Stamp workfare programs, most very small.[41] And the law provides no increase in funding for work programs for Food Stamp recipients, who will now be competing with TANF recipients for a limited number of low-skilled jobs.

G. Medicaid coverage

The Clinton Administration strongly opposed block granting the Medicaid program, and this proposal was dropped from the bill before final passage. Even so, the repeal of AFDC and changes in eligibility for SSI posed a significant threat to Medicaid coverage, because the majority of individuals who received Medicaid were eligible because they received AFDC or SSI. The PRWORA protects Medicaid eligibility for some, but not all, of these individuals.

Senators Chafee and Breaux sponsored, and the Administration supported, a successful amendment to the PRWORA that protects Medicaid eligibility for parents and older children who were eligible for Medicaid only because they received AFDC.[42] The PRWORA protects these parents and children by linking eligibility for Medicaid generally to the state's July 1996 AFDC standards, and not to receipt of assistance under TANF. Children and parents who would have qualified for AFDC under the state's July 1996 AFDC standards will be eligible for Medicaid, even if they are not eligible for TANF. States will be permitted, however, to cut off Medicaid for parents (except pregnant women) whose TANF cash aid is cut off for refusal to work.

Many other needy individuals and families will lose Medicaid coverage as a result of the PRWORA. There is no protection of Medicaid eligibility for children who lose SSI under the new standard for childhood disability, or for elderly and disabled immigrants who lose SSI under the PRWORA. They will continue to receive Medicaid only if they can qualify for Medicaid on other grounds. In addition, most legal immigrants who enter the country after August 22, 1996 will be ineligible for Medicaid (except emergency services) for at least five years, and states will have the option of denying Medicaid to legal immigrants in the country before that date (see chapter on immigration in Citizens' Commission Report).

III. Implementation of the New Welfare Law

Since President Clinton signed the welfare bill on August 22, 1996, implementation of the PRWORA has become a priority for state and federal officials and advocates alike. Although it is still too early to pass judgment on the Administration's implementation efforts, now is a crucial time: state legislatures and executive officers are hungry for guidance — and willing to consider suggestions for plans that might be less harmful. The White House has made general public statements about some issues, such as the need for private sector jobs for welfare recipients, the necessity of considering the impact of domestic violence on welfare recipients, and the importance of improved child support enforcement. However, the Administration has been silent on many of the issues most immediately important for states. In particular, whether because of pressure from the White House or because of perceived limitations in the PRWORA itself, the Department of Health and Human Services (HHS) — the agency traditionally responsible for oversight of anti-poverty programs like AFDC and TANF — has been less responsive than advocates and state officials might have hoped, shying away from offering even technical assistance to states or necessary legal interpretations of key provisions of the legislation.

The Administration has explained its inactivity by pointing to the constraints in the PRWORA on action by federal agencies. As discussed earlier, section 417 of the PRWORA places limits on federal authority. Although the provision means that there are certain actions agencies may not take, there are many ways the Administration — particularly HHS — could influence the way states are developing plans. HHS could not issue regulations that require states to guarantee benefits, or a job, or child care for every eligible family. However, the statutory limitation was not intended to prevent HHS from taking any role in advising states winding their way through the block grant system. HHS could be more active in monitoring and advising states at this time of great change.

HHS has exerted minimum authority over how and when plans are certified:

- *HHS has not required that state plans be specific enough to make the certification process meaningful.* HHS is given the job of certifying state plans in the legislation and actually checking them for "completeness." Thus far, HHS has been unwilling to hold states to even a minimal level of detail on their plans before deeming them "complete." The Department's guidance to states says only "a State plan will be considered complete as long as it includes the information required by the Act."[43] Many plans submitted — and deemed complete by HHS — have been short and conclusory. Often, rather than explaining what the state's plan is for meeting a given requirement of the PRWORA, states have merely quoted back the language of the legislation, such as "State of X certifies that it will set forth objective criteria for the delivery of benefits and the determination of eligibility and for fair and equitable treatment," a direct quotation of the fair and equitable treatment language of Section 402 of the PRWORA. HHS could refuse to accept such meaningless circular responses, deeming them incomplete. Instead, soon after the legislation became law, HHS asked states to submit short plans: "a 15-20 page document that describes the State's program goals, approach, and program features."[44]
- *HHS has been reluctant to halt certification of a state plan even when it appears to violate well-established constitutional rights.* The state of Michigan recently submitted a plan which provided that its "hearings" would occur only after the recipient had been cut off from benefits, HHS only remarked in a letter that such a provision "might implicate principles of procedural due process."
- *HHS has gutted a key procedural requirement for state plans.* Under section 402(a)(4), a State must have a 45-day public comment period for local governments and private organizations to comment on the plan and the design of services. Not only has HHS been unwilling to enforce this procedural requirement in the legislation, it has encouraged states to skirt the requirement. The Department recently announced, "While a State may certify that this requirement has been met by a process that occurred prior to enactment of the PRWORA, we would encourage States to consider carrying out a period of public comment in the context of the PRWORA. At State option, a State may submit a plan that is complete in every other respect but has not yet received a period of public comment. In this case, the 45-day comment period can run concurrently with the Secretary's review of the plan."[45]

There are many questions — and few answers— about the Clinton Administration's interpretation of a number of sections of the legislation. The following is a list of areas on which clarification is needed — states are waiting for an administrative or legal interpretation. Providing such clarification would not violate the PRWORA's limits on federal authority. On the contrary, it would allow states to proceed with better information about what they can do:

- The welfare legislation provides that if a state opts to continue a waiver that was in effect on the date of the PRWORA's enactment, it need not comply with those provisions of the welfare legislation that are inconsistent with the waiver until the waiver expires. HHS has not yet provided an interpretation of when it believes a waiver is "inconsistent" with requirements of the welfare bill. It is also unclear, as a jurisdictional matter, whether HHS is the proper entity to decide whether a provision is inconsistent.
- HHS has also not yet decided whether the 20% limit on participation in vocational education applies to the entire caseload, or to the number participating in work activities. Section 407(c)(2)(D) states:

  > *For purposes of determining monthly participation rates under paragraphs (1)(b)(i) and (2)(b) of subsection (b), not more than 20 percent of individuals in all families and in 2-parent families may be determined to be engaged in work in the State for a month by reason of participation in vocational educational training or deemed to be engaged in work by reason of subparagraph (C) of this paragraph [which allows teen parents attending school to be deemed to be engaged in work activities].*

  The final language on the 20% limitation may be read as allowing 20% of the caseload to participate in work activities, rather than 20% of the persons participating in work. Some states, such as Ohio, have state plans that would put more recipients into vocational educational training if such a plan is allowed.[46] However, states need to know up front whether HHS will consider a program allowing 20% of the caseload to be in vocational educational training to violate the work participation rules (thus making the state subject to a penalty).
- HHS has been slow to interpret Section 402 (a)(7), the Family Violence Amendment. The amendment gives states the option of certifying and implementing screening procedures to waive requirements of the welfare bill, including time limits and work requirements, for women for whom domestic violence makes it unrealistic to meet those requirements. States are anxious to know whether the Family Violence Amendment provides extra flexibility for states within the confines of the federal welfare requirements — in particular within the work participation requirement and the 20% hardship exemption from the 60-month time limit — or whether it merely spells out one option for states to develop in their state plans.
- States do not yet know for sure know what spending will count toward their "maintenance-of-effort" requirement, the requirement that states maintain overall state funding at 75% of what they spent in 1994 (80% for states failing to meet the work requirements in the legislation). For example, states may want to spend state money on programs to provide benefits to legal immigrants otherwise not provided for by the welfare legislation. While it is clear such spending is allowed, it is not clear whether such spending would count toward the maintenance-of-effort requirement.

IV. Recommendations for Federal Agency Action

Despite the many concerns raised by the new welfare law, President Clinton's public statements about the welfare legislation have been limited to suggesting that he wishes to change two, possibly three, areas of the law. Immediately upon signing the law, the President stated that he would improve some of the harsh food stamp provisions and change some of the restrictions on legal immigrants' ability to receive benefits. More recently, the Administration has been discussing tax credits and subsidies to encourage private employers to hire welfare recipients.

Civil rights and anti-poverty advocates see many more areas in need of change — and at the same time are fearful that even those limited areas mentioned by the President will not be addressed in his second term. Some of the necessary changes will require action by Congress, but even under the PRWORA, there are ways the Administration could make a real difference in the lives of the families endangered by some of the provisions of the new legislation.

A. Improved Interagency Coordination

Many implementation and enforcement issues demand interagency strategies and coordination. Although a few agencies, such as HHS and the Immigration Naturalization Service, are given unique responsibilities under the PRWORA, a number of different agencies may have overlapping responsibilities as the new law is implemented.

- *Enforcement of Civil Rights Laws.* There are several agencies, including HHS, the Department of Justice, the Department of Labor, the Equal Employment Opportunity Commission, and the Department of Education, charged with civil rights enforcement responsibilities. Even with the limits imposed by the PRWORA, these agencies are not precluded from — and in fact have an obligation to — vigorously enforce civil rights laws. Unfortunately, some of the laws that have particular relevance, such as Title VI of the Civil Rights Act of 1964 which prohibits race and national origin discrimination in federally funded programs, already have a history of underenforcement.[47] Thus, these agencies will have to craft new strategies to detect and challenge discriminatory practices that emerge under the new law, and better coordinate their enforcement efforts. Given the potentially devastating consequences of the PRWORA's harsh provisions, federal agencies must ensure that welfare recipients are treated fairly, and their civil and constitutional rights guaranteed.
- *Monitoring the Effects of Changes in Safety Net Programs.* The PRWORA has some limited provisions for data collection and monitoring by states, HHS, and the Census Bureau. However, the law may have broader impacts on families and communities which other agencies must monitor. For example, cuts in family income may lead to an increase in homelessness or families inadequately housed; the influx of workers into the low wage labor market may impact wage levels and unemployment claims; businesses in poor communities may be impacted by the loss in income; domestic violence and child abuse and neglect may increase. Thus, in addition to HHS, the Departments of Labor, Education, Housing and Urban Development, Justice, Agriculture, and Commerce should work together, and with service providers, advocacy groups, and researchers, to develop a plan for analyzing the full impact of the law.
- *Expanding Work Opportunities.* One of the main challenges posed by the new law is its mandate to move a substantial number of welfare recipients into the workforce. Many states will be struggling to craft new strategies to expand work opportunities for welfare recipients and meet the PRWORA's rigid work requirements. Central to this struggle is the need for jobs that pay livable wages. The Administration should develop a coordinated strategy to work with states that want to develop innovative programs to help welfare recipients achieve self-sufficiency. This strategy should go beyond offering tax credits to employers to hire welfare recipients, and should also attempt to address the other barriers — such as lack of support services and lack of certain technical skills — that often limit the ability of many welfare recipients to leave the welfare system permanently. Creating incentives for states (for example, through the high performance formula)[48] to provide welfare recipients with support services they may need to go to work, giving states the flexibility to expand their definitions of

work to meet the different needs of welfare recipients in their state, and developing a list of model programs are only a few of the steps that the Administration can take to support state efforts.

Interagency strategies and coordination will be particularly important during the coming months in light of many agencies' dwindling resources. Collaborative enforcement efforts may help agencies better leverage their resources and strengthen their effectiveness and efficiency.

B. Specific agency activities[49]

1. The Department of Health and Human Services.

Although its authority over TANF is more restricted than its authority over AFDC, HHS could play a crucial role in implementing the new welfare legislation. Beyond the implementation issues already discussed (see above), HHS should:

- vigorously enforce provisions against discrimination in TANF-funded programs;
- encourage states to use the full flexibility permitted by the law to allow participation in education and training activities that will prepare recipients for family-supporting jobs;
- use its authority to give bonuses to "high-performance" states to reward states that help families escape poverty — not just cut caseloads;
- interpret the Family Violence Amendment in a way that ensures that states that implement it are not penalized by work participation requirements and the limit on "hardship exceptions," and provide technical assistance on how states may most effectively serve victims of domestic violence; and
- carefully monitor the effect of program changes on children and families through establishing standards for state data collection, undertaking its own data collection, and supporting and encouraging research efforts that will address the status of families who do not receive assistance under the new law, as well as those who do.

HHS also has responsibilities for implementation beyond the TANF program. It should:

- assist states in developing plans for providing child care that meet the needs of working parents and provide children with quality care;
- use its authority to set the new standard for eligibility for children's SSI so as to minimize the impact on poor children with severe disabilities;
- ensure that states implement the reforms required in their child support enforcement systems, and ensure that states fairly implement the cooperation and good cause provisions of the law; and
- ensure that states implement outreach programs and other procedures to ensure that eligible families and individuals actually receive Medicaid coverage.

2. The Department of Labor.

The Department of Labor (DOL) plays an important role in monitoring workplace practices. With the PRWORA's emphasis on work, DOL can provide clarity on the application of basic employment laws such as the Fair Labor Standards Act (FLSA) and OSHA laws to welfare recipients working in a variety of settings. Most importantly, DOL can take the lead in encouraging states and employers to promote good employment practices and create meaningful job opportunities for welfare recipients.

Challenging Unfair Work Practices. DOL often works with both employers and employees to identify good employment practices and also discourage inappropriate ones. As already discussed, the PRWORA may open the door to new hazards in the workplace. The PRWORA's eligibility restrictions, for example, may force even more legal immigrants into underground labor markets, like sweatshops, to support their families and survive. And recent federal–state efforts to move welfare recipients into jobs previously occupied by undocumented workers may actually force welfare recipients to work for employers already guilty of illegal, exploitative employment practices.[50] DOL will have to be even more alert to identify potential workplace abuses and eliminate such practices.

Access to Job Training Programs. Many states may want to develop welfare work programs that combine work with training so that welfare recipients can build valuable skills. DOL, which oversees numerous job training programs, can give states information about effective programs and program models, and support state efforts to give welfare recipients the training that they may need.

Minimum Wage Protections. One problem facing many welfare recipients who want to work is the lack of jobs that pay livable wages. DOL should make clear that the FLSA, which requires that certain employees earn a minimum wage, in many cases will cover welfare recipients working in workfare and other employment programs. Earning at least the minimum wage, especially if it is combined with eligibility for the Earned Income Tax Credit, will help welfare recipients move closer to self-sufficiency.

Family and Medical Leave. DOL should make sure that the protections guaranteed by the Family and Medical Leave (FMLA) to workers are available to working welfare recipients who are eligible. If, for example, a workfare worker or her child becomes seriously ill and she misses a few days of a workfare assignment, they should not lose their TANF benefits. DOL should also explore other policy alternatives to address the family and medical leave needs of welfare recipients who are covered by the FMLA.

In light of these concerns, DOL should:

- work aggressively to ferret out discriminatory workplace practices that target welfare recipients,
- provide states guidance on the applicability of important labor laws such as the Family and Medical Leave Act to welfare recipients,
- support state efforts to expand access to quality job training programs, and
- work on different strategies to help welfare recipients earn at least the minimum wage and have a more realistic chance of supporting their families and leaving the welfare system.

3. The Equal Employment Opportunity Commission.

The Equal Employment Opportunity Commission (EEOC) is charged with the responsibility of enforcing various employment discrimination laws. The PRWORA's emphasis on work creates a new opportunity for the EEOC to ensure that welfare recipients who go to work are protected against employment discrimination.

Sex Discrimination. Discriminatory barriers — such as biased stereotypes about women's abilities — often exclude women, especially welfare recipients and women of color, from many job opportunities, and relegate them to the lowest-paying, least desirable, least stable jobs. Welfare recipients, who are concentrated in these jobs and whose families' access to subsistence benefits may hinge their ability to keep these jobs, will be easy and vulnerable targets for discrimination. Female welfare recipients, for example, may be steered into lower wage jobs with few advancement opportunities while the better opportunities are reserved for male participants. Welfare recipients participating in work programs may be sexually harassed or face other abusive situations. Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, or national origin, is an effective tool that the EEOC can use to challenge such discriminatory practices.

Pay Discrimination. Almost 40% of welfare mothers can only find work in the lowest-paying service occupations, such as maids, cashiers, nurse's aides, child care workers, and waitresses — jobs that rarely provide health benefits, child care, or sick leave.[51] Many women in these jobs face pay discrimination, actually earning less than their male counterparts — female domestic workers earn a median wage of $236 per week compared to $282 for male domestic workers; female cashiers earn $220 compared to $264 for male cashiers; and female waitresses earn $235 compared to $298 for male waiters.[52] In some cases, laws like the Equal Pay Act, which prohibits unequal wages for substantially equal work, can be used to challenge discriminatory practices that artificially suppress the wages of welfare recipients.

Pregnancy Discrimination. Some welfare recipients who are or who become pregnant may lose out on important job opportunities because an employer or a job placement agency does not want to accommodate the needs of a pregnant worker. Unless a state chooses to exempt them, many pregnant welfare recipients will be subject to the same work requirements as other welfare recipients and risk serious penalties if they cannot find work. Vigorous enforcement of the Pregnancy Discrimination Act by the EEOC will be an important step toward weeding out discriminatory practices that unfairly harm pregnant welfare recipients.

There are a number of steps that the EEOC can take including:

- issuing a policy guidance clarifying covered employers' obligations under federal anti-discrimination law to workers participating in welfare work programs;
- investigating claims of discriminatory employment practices by temporary and other employment agencies used by states to place welfare recipients in jobs;
- investigating claims of discriminatory pay practices involving employers and welfare recipients, and vigorously enforcing the Equal Pay Act where violations are uncovered;
- investigating claims of sexual harassment and pregnancy discrimination involving employers and welfare recipients and challenging discriminatory practices, using the full range of anti-discrimination laws including Title VII and the Pregnancy Discrimination Act.

4. The Department of Education.

The Department of Education (DOE) plays a critical role in formulating education policy and overseeing a variety of education programs for youth and adults. The PRWORA's work requirements will make it difficult for welfare recipients to attain higher levels of education, even if more education would put them in a better position to find work. DOE can educate states about the links between higher educational attainment and higher wages, and encourage states to invest in helping welfare recipients become better prepared for work.

Expanding Access to Education and Investing in Better Work Preparation. DOE can work with states seeking creative ideas on how to expand education opportunities for welfare recipients. States may seek guidance on whether they can use more expansive definitions of the PRWORA's work activities, such as vocational education training, to broaden the range of programs available to welfare recipients. Ohio, for example, has sought to have work on earning a GED count as an approved work activity under the PRWORA. DOE should support such state-efforts by providing examples of different types of programs that could fall within the new law's work activities, such as displaced homemaker and single-parent programs funded by the Carl Perkins Vocational Education Act, or programs that integrate school- and work-based learning. Through these effort, welfare recipients can be better prepared for a wider range of jobs and better able to compete with other job applicants.

Specifically, DOE can:

- inform states about effective education programs that fall within the new law's work activities, and support innovative state efforts to provide welfare recipients with a range of programs to improve worker preparedness and give welfare recipients a better chance for finding, and keeping, livable wage jobs.

5. The Department of Justice.

The Department of Justice (DOJ) has a central role in enforcing Title VI of the Civil Rights Act, and particularly in the area of immigration. If not closely monitored, the PRWORA could undermine anti-discrimination effort by permitting states to make arbitrary decisions about who gets benefits and services, or what types of benefits and services are available. A mother who is eligible to participate in a particular welfare program could be shut out simply because she speaks with an accent and is assumed to be in this country illegally. DOJ can plan an important role in monitoring states and challenging discriminatory practices.

V. Recommendations for Congressional/ Legislative Activities

The PRWORA is deeply flawed, in part, because it largely ignores — and, in fact, exacerbates — the real problems facing families struggling to escape poverty. The enormity of these flaws makes the task of crafting discrete legislative "fixes" nearly impossible — and unrealistic in light of both the massive overhaul the new law needs and the virtually unchanged composition of Congress. With that in mind, these recommendations for Congressional/Legislative activities focus on developing a framework for a legislative agenda during the coming months and years.

1. Strengthening Enforcement of Civil Rights Law and Ensuring That Welfare Recipients are Treated Fairly.

By eliminating many of the safeguards previously in place to protect against discrimination, the PRWORA risks undermining basic civil rights protections for low-income families. Upholding basic civil rights protections should be a core principle of any future welfare legislative initiative — and Congress should make clear that enforcement of civil rights laws is a Congressional priority.

- *Adequate Funding for Civil Rights Enforcement.* Vigorous federal enforcement of civil rights laws is crucial to ensuring that the law is not implemented in a discriminatory manner, and that welfare recipients are not treated unfairly. However, federal agencies need adequate funding — and civil rights offices are a frequent target of Congressional budget cutters. Federal agencies charged with the responsibility of enforcing civil rights laws must have the resources to do their work, and the PRWORA's new changes will require agencies to craft new strategies to identify discriminatory practices as the new law is implemented. During the appropriations process, and also in the event of future legislative welfare initiatives, Congress has an obligation to ensure that these agencies have adequate resources to enforce civil rights laws effectively and efficiently.
- *Ensuring Fair and Equitable Treatment.* The PRWORA acknowledges the need to ensure that states treat welfare recipients fairly by including a "fair and equitable treatment" component in the state plan each state must submit. Unfortunately, the PRWORA does not take the important next step of creating an adequate enforcement mechanism to ensure that the rules and procedures adopted by each state are truly fair and equitable, and to ensure that states follow their own rules and procedures. Any future legislative initiative should expand upon this provision to ensure that states can be held accountable for violating their own rules and procedures, and treating welfare recipients unfairly.
- *Ensuring Protections Against Sex and Other Forms of Discrimination.* While the PRWORA makes clear that TANF block grant funds remain covered by the anti-discrimination laws historically used in the welfare context, the new law neglects to discuss other anti-discrimination laws that also apply. This is particularly important in the area of sex discrimination because there is no general provision that prohibits sex discrimination in federally funded programs. Moreover, strong anti-discrimination protections are critical to ensuring responsible oversight of states. Any legislative initiative should make clear sex and other forms of discrimination are flatly unacceptable in any state's welfare programs.

2. Expanding Opportunities for Low-Income Families to Achieve Economic Security.

The PRWORA fails to tackle many of the obstacles that block the paths of low-income families seeking long-term economic security, and thus makes it difficult for welfare recipients to leave the welfare system permanently. Not only does the PRWORA ignore the barriers to work facing many welfare recipients, it exacerbates these barriers by imposing unrealistic work participation rates, restricting the type of work welfare recipients can do (and have it count as work), and limiting access to education and job training. All of these provisions should be re-examined with a better understanding of the real barriers that welfare recipients, most of whom are single mothers, face. A real welfare reform initiative must include: funding for quality education and training programs; a job creation strategy that emphasizes the creation of new, permanent jobs at decent wages, and does not subsidize employers for temporarily hiring workers at sub-minimum wages; access to the support services low-income families need, including child care, transportation, health-care and domestic violence and other counseling services; and provisions permitting parents to combine their work and family responsibilities.

Conclusion

When he signed the welfare law, President Clinton turned much of the responsibility for administering public assistance programs to the states. Responsibility for what happens to poor people, however, cannot be so readily abandoned. As the states implement the new welfare law, the Administration must do all it can to ensure that people are treated fairly and helped out of poverty — and must be held accountable for the consequences.

Endnotes

[1] On January 9, 1996, President Clinton vetoed a free standing welfare bill, H.R. 4. The welfare provisions of the bill signed by the President, the Personal Responsibility and Work Opportunity Reconciliation Act, are very similar overall to those in H.R. 4. In some respects, the PRWORA is less damaging than H.R. 4 would have been (less of a shortfall in child care assistance and the contingency fund that provides some additional money in times of recession, less severe cuts in aid to poor families with disabled children, no option for a Food Stamp block grant, and protection of Medicaid coverage). In other areas, the PRWORA is harsher than H.R. 4 (deeper cuts in the Food Stamp program, including imposing a limit on the number of months in which unemployed adults not raising children may receive Food Stamps; deeper cuts in aid to legal immigrants, and a prohibition on using block grant funds to provide non-cash assistance to children whose parents cannot find employment after their time limit expires). The PRWORA and the vetoed bill, H.R. 4, were estimated to have a similar effect on increasing child poverty.

[2] The Urban Institute analyzed the impact of the House version of the bill, which was very similar to the final version of the PRWORA.

[3] Sheila Zedlewski, Sandra Clark, Eric Meier, Keith Watson, *Potential Effects of Congressional Welfare Reform Legislation on Family Incomes* (The Urban Institute: 1996).

[4] David Super, Sharon Parrott, Susan Steinmetz, and Cindy Mann, *The New Welfare Law*, at 31 (Center on Budget and Policy Priorities, 1996).

[5] Jason DeParle, "In Welfare Debate, It's Now Not "How?" but "Why?" *New York Times*, May 8, 1994.

[6] The effort to "make work pay" was further advanced in the 104th Congress, when the Administration supported and signed a bill increasing the minimum wage.

[7] *See* Mark Greenberg, Steve Savner, and Rebecca Swartz, *Limits on Limits: State and Federal Policies on Welfare Time Limits* (Center on Law and Social Policy: 1996).

[8] Douglas Besharov, "Waivers Change the Face of Welfare," *Los Angeles Times*, June 20, 1996, B9.

[9] *See Limits on Limits, supra* n. 7.

[10] 397 U.S. 254 (1970).

[11] *See generally*, 42 U.S.C. 601, *et. seq.*

[12] Under a block grant system, states are given fixed pots of money to run their welfare programs with few rules on how those programs should be designed. The fixed amount of money received through the block grant is frozen over time — the amount of funding that each state receives does not change even if a state's welfare population increases significantly or if the state experiences a severe economic downturn. Thus, states faced with budget pressures will have an incentive to cut off families or severely limit the type of assistance available. The PRWORA does create a small population adjustment fund that, for four years, provides some additional funding to states with growing populations and low welfare spending. However, population growth during this period is expected to be four times greater than the growth in block grant funding. There is also a contingency fund to provide additional funding during recessions; however, the $2 billion allotted to the fund for a five-year period is only one-third of what was needed during the 1990-92 recession. *The New Welfare Law*, *supra* n. 4, at 7. For a more detailed discussion of the budgetary impact of block grants, *see* Service Employees International Union, *Block Grants Backdoor Budget Cuts*, January 1995.

[13] The allocation will be based on the highest of FY 1994, FY1995, or an average of FY 1992-1994 spending.

[14] States may spend their own funds to assist these families, and they may use funds from the Title XX Social Services block grant to provide assistance. However, the PRWORA cut the Title XX block grant by 15%.

[15] For example, Nebraska's state plan continues to apply a policy approved in a waiver of not paying

additional benefits for children born while the mother is already receiving benefits. The policy only applies in selected counties, rather than state-wide. *See* Nebraska's state plan submitted October 1, 1996. All references to state plans refer to those on file with the Administation for Children and Families as of December 9, 1996.

[16] This chapter focuses on the provisions in the PRWORA with civil rights implications, except for the specific provisions covering religious discrimination. For a more detailed discussion of the religious discrimination provisions, *see* The Working Group for Religious Freedom in Social Services, *The "Charitable Choice" Provisions in the Welfare Bill: A Burden on State Governments and Individual Religious Freedom,* Legislative Briefing Packet, 1996.

[17] Section 402(a)(1)(B)(iii).

[18] *Compare* California state plan at 14-15 *with* Wisconsin state plan at 3 .

[19] *See, e.g.,* California's state plan at 14.

[20] *See,* Letter, Marion N. Steffy, Regional Administrator, Administration for Children and Families, Department of Health and Human Services, to Gerald H. Miller, Director, Michigan Family Independence Agency, September 30, 1996, at 2 (noting that Michigan's state plan appears to deny the opportunity for hearings prior to terminating benefits).

[21] The Age Discrimination Act of 1975 prohibits discrimination on the basis of age in programs or activities that receive federal financial assistance, section 504 of the Rehabilitation Act prohibits discrimination on the basis of disability in programs or activities that receive federal financial assistance, the Americans with Disabilities Act prohibits discrimination against people with disabilities, and Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race or ethnicity in programs or activities that receive federal financial assistance.

[22] 42 U.S.C. sec. 684 (1988 Family Support Act amendments).

[23] Section 684(a)(1) and (4).

[24] States that obtained waivers prior to the effective date of the new law do not have to comply with provisions — including the work participation rates — that are inconsistent with their waiver, until the waiver expires.

[25] Section 407(a)(1)-(2). The PRWORA describes a specific formula to calculate the participation rate. For all families, the monthly participation rate is the total number of families with adult or minor child head of household engaged in work divided by the total number of families with adult or minor child head of household receiving assistance (minus those families subject to a penalty, but not for more than 3 months during a 12 month period; and also single parents of children under 1 year of age, but not for more than 12 months). The same formula (substituting the phrase "two-parent families" for "all families") is used to calculate two-parent family participation rate.

[26] The PRWORA does include specific rules that allow states to lower the work participation rate by the amount that their caseload has fallen since FY 1995 (as long as the reduction does not take into account caseload reductions resulting from changes required by federal law or changes in eligibility criteria). States can also exempt single custodial parents caring for a child under the age of 1 from the work requirements and the work participation calculations. *See* section 407(b)(3) (reduction of work participation requirement) and section 407(b)(5) (exemption of single custodial parents).

[27] Section 409(a)(3)(B)(i).

[28] Section 409(a)(3)(B)(ii).

[29] Section 407(d). Many of the work activities listed are undefined so states may vary in their interpretations of what types of activities are covered by these terms.

[30] Section 407(c)(2)(C).

[31] Section 407(c)(2)(B).

[32] Section 407(e). If the recipient cannot comply with the work requirements because he/she lacks child care, and the child is under 6 years of age, then the family cannot be cut off. *See* Section 407(e)(2).

[33] The term "vocational education training" is undefined in the law, and it is unclear what programs fall in this category. Technical assistance to the states on the range of programs that could be covered by this term may be needed from the Department of Health and Human Services, the Department of Labor, and/or the Department of Education in the future.

[34] Section 407(c)(2)(D). The law states that the 20% cap applies to the state's overall caseload. The legislative history, however, suggests that a more restrictive cap — one that applied only to those participating in work activities — may have been intended.

[35] Section 407(d)(8).

[36] Two other work activities — education directly related to employment and satisfactory attendance at a secondary school — also cannot count toward the minimum hours requirement, unless the participant is a teen parent.

[37] Clifford Levy, "Welfare and the Working Poor," *New York Times*, November 17, 1996.

[38] *See* Judge David L. Bazelon Center for Mental Health Law, "The Impact of Children's SSI Program Changes in Welfare Reform," August 7, 1996.

[39] There were allegations that the program, especially the "Individualized Functional Assessment," was being abused. However, examinations of the program by the Social Security Administration, the HHS Office of Inspector General, and the General Accounting Office failed to substantiate the allegations of widespread fraud. "The Impact of Children's SSI Program Changes" generated criticism redefinition goes far beyond the reforms needed to tighten up the program. A National Academy of Social Insurance panel conducted an extensive review of the children's SSI program and concluded that while "eligibility criteria need to be strengthened, ... allegations of widespread inappropriate allowances are not substantiated and sharp cuts in the current rolls are not warranted." It recommended eliminating "maladaptive behavior" as a separate element in assessment, increased use of standardized tests to measure mental disorders, and restructuring individual functional assessments of children's disability. National Academy of Social Insurance, ***Restructuring the SSI Disability Program for Children and Adolescents*** (May 1995), pp. 32-33, cited in ***The New Welfare Law***, ***supra*** n. 4, at 29-30.

[40] For more information *see* ***The New Welfare Law***, ***supra*** n. 4, 17-23.

[41] Center on Budget and Policy Priorities, ***Food Stamp Provisions of Welfare Law May Have Harsher Effect on Unemployed Adults than Congress Intended*** (October 1996).

[42] Children born after September 30, 1983 in families with income below the federal poverty line are separately entitled to Medicaid coverage.

[43] Department of Health and Human Services, Administration for Children and Families, "Draft: State Guidance for the Temporary Assistance for Needy Families Program," September 1996, at 2.

[44] *Id.*

[45] Guidance (Q&A) Form, Olivia A. Golden, Acting Assistant Secretary for Children and Families, Department of Health and Human Services, October 9, 1996, at 3.

[46] *See* B.G. Gregg, "School May be Counted as Work," *Cincinnati Enquirer*, at B1.

[47] The U.S. Commission on Civil Rights recently undertook a comprehensive review of federal Title VI enforcement efforts and concluded that these efforts had "extensive deficiencies." *See* U.S. Commission on Civil Rights, ***Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs***, June 1996.

[48] The PRWORA directs HHS, the American Public Welfare Association, and the National Governor's Association to develop a high-performance formula to measure state performance and reward high-performing states. Section 403(a)(4).

[49] As already noted, there are a number of federal agencies that may have a role to play as the PRWORA is

implemented. This chapter will limit its recommendations to agencies with extensive civil rights enforcement responsibilities.

[50] Jon Jeter, "Va. To Turn INS Raids Into Welfare Job Leads," *Washington Post,* November 1, 1996, at B1.

[51] Roberta Spalter-Roth, "Welfare That Works: Increasing AFDC Mothers' Employment and Income," Testimony before the Subcommittee on Human Resources, Committee on Ways and Means, (February 2, 1995); Virginia L. Carlson and Nikolas C. Theodore, *Are There Enough Jobs? Welfare Reform and Labor Market Reality,* at 13.

[52] Bureau of Labor Statistics, "Employment and Earnings," Table 39 (January 1995).

Chapter XI

Welfare Reform: A New Immigrant Policy for the United States

by Wendy Zimmermann and Michael Fix

Introduction

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996[1] significantly scales back welfare benefits for the poor and disabled and gives states greater responsibility for designing assistance programs for needy families. The new law singles out immigrants for especially deep cuts while giving states new powers to determine immigrants' eligibility for public services.

New restrictions on legal immigrants' eligibility for benefits represent a radical shift in the nation's immigrant policies, *i.e.*, those policies that influence immigrant integration. By treating immigrants differently than other groups, the welfare law transforms U.S. immigrant policy from a *laissez-faire* or hands-off set of policies that treat legal immigrants on largely the same terms as citizens, to an explicit policy of exclusion.

Congressionally enacted limits on the public services available to immigrants were accompanied by equally significant limits imposed on immigrants' due process rights by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[2] and the Anti-Terrorism and Effective Death Penalty Act of 1996.[3] The latter two laws significantly limited the rights of those seeking asylum in the United States, illegal immigrants who are apprehended in the U.S. and legal immigrants who commit crimes.

When viewed collectively, welfare reform, illegal immigration reform, and the anti-terrorism bill differ in important ways from Congressional efforts to reform immigration over the past three decades. First, the reforms attempt to mitigate the purportedly negative impacts of immigration by restricting the benefits and rights available to immigrants, not by reducing the number or changing the characteristics of new immigrants. Indeed, attempts to limit legal immigration during the 104th Congress were stymied by opposition from an unusual coalition of immigration advocacy groups, libertarian think tanks and high-tech employers fearful of losing highly skilled international workers.[4]

Second, unlike the other landmark immigration laws enacted over the past 30 years which balanced inclusionary and exclusionary forces, the 1996 reforms are overwhelmingly exclusionary in character.[5] It could be argued that the reforms set out in the welfare, illegal immigration, and anti-terrorism laws represent the most exclusionary turn in immigration policy since the establishment of the national origins quota system in the nativist 1920s.

Third, each embraces a policy of what has been termed immigrant exceptionalism — one that seeks to deepen the differences between the rights and entitlements of citizens and non-citizens. In so doing, the laws tend to elevate the power and authority of the government over that of the individual. As a result, they represent a sharp retreat from important trends in immigration law that began to emerge in the 1970s — trends that vested legal and illegal immigrants with expanding rights and privileges and embraced more universalistic visions of membership.[6]

As we imply above, the immigrant provisions in welfare reform — the primary focus of this chapter — carry broad policy implications for individuals and institutions that go well beyond changes in immigrants' eligibility for public benefits. They represent a redefinition of citizenship, a departure from past refugee policy, a reformulation of the role of immigrant families and sponsors and an expansion of the immigration-related enforcement duties of public- and private-service providers. The new welfare law also signals a dramatic shift in the roles of federal, state, and local governments in the integration of immigrants and in the distribution of their costs and benefits across federal, state, and local governments.

The broad new restrictions on immigrants could have a profound effect on future integration patterns. However, many crucial policy choices remain that will determine how much of the safety net is left for immigrants and the degree to which welfare reform promotes or retards integration.

We begin this paper by examining the political evolution and policy context of the welfare reform's immigrant restrictions. We then review some of the law's expected impacts. The following section examines some of the policy implications and implementation issues that stem from the reforms. As we proceed, we suggest some of the ways the welfare reform, illegal immigration, and anti-terrorism laws interact.

I. Background

A. Political Evolution

Federal proposals to broadly restrict legal immigrants' eligibility for public benefits have a long and thoroughly bipartisan history. President Clinton's original proposal for welfare reform introduced in 1994 included restrictions on immigrants that were nearly as restrictive as those included in the version of the bill that became law. The initial restrictions were later broadened by the Personal Responsibility Act, a centerpiece of the Republicans' 1994 Contract for America. A modified version of the restrictions was later included in immigration reform proposals in both the House and Senate. Finally, a Republican-sponsored welfare reform law passed the Congress and was signed by the President. While the version finally signed by the President was one of the most restrictive proposed, a nearly identical set of restrictions sponsored by Senator Alan Simpson was poised to become law under the rubric of immigration reform, had Congressional proponents of welfare reform failed.

The primary rationale for all proposals to curb immigrants' access to benefits was the need for federal budget savings. Nearly half the $54 billion in estimated savings from welfare reform is expected to come from the immigrant exclusions. Although the President has publicly stated that he signed the bill *despite* the immigrant restrictions and that he intends to try to "fix" the provisions in the next Congress, the fiscal and political costs of doing so are likely to prove too great for sweeping policy reversals.

B. Policy Context

What developments made such restrictive, potentially far-reaching reforms possible just a few years after Congress voted to increase legal immigration by 40%?

Growing Numbers and Concentration. The first half of the 1990s has seen larger numbers of immigrants entering the United States than ever before, with more than one million immigrants entering and staying each year. This figure includes about 700,000 legal immigrants, 100,000 refugees, and 200,000 to 300,000 illegal immigrants. The force of these flows has been magnified by its concentration in a handful of states, with more than three-quarters of recent immigrants living in just six states.[7]

Debate Focused on Immigrants' Costs and Use of Welfare. Over the past several years the debate over immigration has become increasingly visible. But the tenor of the current debate differs from earlier periods, focusing less on the number and qualifications of new immigrants and more on their costs. Immigrants' participation in welfare and other public assistance programs has been at the core of that debate — which may help explain the use of welfare rather than admissions policy to limit immigration's perceived negative impacts. The political debate over immigrants' use of public benefits in the 104th Congress returned repeatedly to a number of questions: Are immigrants more likely to use benefits than natives? Do immigrants come to the United States for benefits? Do they contribute more in taxes than they use in services? Are immigrants' families assuming responsibility for the relatives they sponsor?

The answers to these questions depend on the analytic approach adopted. Although immigrants have slightly higher overall levels of welfare use than natives, their welfare use is heavily concentrated among two subpopulations. One is refugees, who enter the United States under different and more trying circumstances than other immigrants. The other is elderly immigrants, many of whom use Supplemental Security Income (SSI) because they have not worked enough quarters to qualify for social security, and because SSI represented a bridge to Medicaid and health insurance.[8] By contrast, non-refugee working-age immigrants use welfare at rates that are comparable to those of working-age natives, although their use has increased somewhat in recent years.

The unit of analysis also matters: when immigrant-headed households are compared to native-headed households, immigrants show higher rates of welfare use than natives. This is because many immigrant households contain native-born citizens who use welfare and because immigrant households are larger than native households.[9] Results can also differ because "welfare" can be defined in many ways. Conventionally, "welfare" refers to cash assistance programs. But it can also be defined to include a wide variety of public assistance programs ranging from Medicaid, to the reduced price school lunch program to housing assistance. But even when these broader measures are included, higher individual use of benefits among immigrants (*versus* natives) for individual programs is only evident for the SSI program.

The concentration of immigrant welfare use among refugees and the elderly suggests that the immigrant restrictions have not been driven by the same behavioral goals that have animated welfare reform more generally: that is, moving single mothers into the workplace and discouraging out-of-wedlock births. Rather, the immigrant restrictions in the welfare bill are more likely the product of fiscal imperatives coinciding with an increased tolerance for anti-immigrant measures.

The immigrant restrictions should also be viewed in the context of a shrinking welfare state that is allocating losses rather than gains to almost all vulnerable populations. We see, then, that welfare reform narrows SSI disability criteria and imposes a three month limit on able-bodied adults' use of food stamps in any three year period. Looking beyond the welfare context, we see similar trends. Thus, for example, the restrictions on immigrants' due process rights imposed by the immigration and anti-terrorism laws have been accompanied by Congressional and judicial attempts to limit the reach of legal services and class action litigation for the general population. Still, while immigrants confront the same limits on services as other groups, they must also contend with the additional restrictions on rights and benefits for which they have been singled out.

II. Welfare Reform and Immigrant Eligibility for Public Benefits

The welfare reform legislation makes five key sets of changes to immigrants' eligibility for public assistance programs. As a primary matter, *the law bars legal immigrants for the first time from receiving most federal means-tested public benefits.* The legislation places more severe restrictions on future immigrants, (*i.e.,* those entering on or after August 22, 1996), than on immigrants living in the United States when the law was passed (referred to as "current immigrants"). Both current and future legal immigrants are barred from receiving SSI and food stamps. Future legal immigrants are barred from receiving most federal means-tested benefits for their first five years in the country.

Second, *the law increases sponsors' responsibility for the immigrants they bring into the United States.* When legal immigrants are admitted to the country they must demonstrate that they will not become a "public charge," or a burden on the U.S. coffers. Affidavits of support signed by a relative or friend will satisfy this requirement, although such affidavits, in their current form, do not legally bind sponsors who fail to support immigrants. Welfare reform requires that a new affidavit of support be designed that is legally enforceable. (There is, however, some question whether this is legally feasible.)

The new law also expands sponsor-to-alien deeming, under which the sponsor's income is deemed to be available to the immigrant when determining eligibility for public benefits. Prior to the passage of the welfare law, a portion of the sponsor's income was deemed to the immigrant for three major programs: AFDC (Aid to Families with Dependent Children), SSI, and food stamps. The deeming period lasted for three years after entry for AFDC and food stamps and five years for SSI. Under the new law, deeming is expanded to most federal means-tested programs and will last until the immigrant naturalizes. The new deeming requirements will not go into effect until after the five-year bar on federal means-tested programs has run for new immigrants.

The recent illegal immigration reform bill imposed new requirements on sponsors, requiring that they earn at least 125% of the poverty level. While no firm income requirements were applied under former law, the poverty level was used to assess a sponsor's ability to support an immigrant. It could be the case that the new income threshold will prohibit many low-income persons from sponsoring family members, potentially altering future legal immigration flows.[10]

Third, *the legislation bars aliens categorized as "not qualified" aliens, from most federal, state, and local public benefits.* These include undocumented immigrants and others with temporary authority to remain in the United States. The legislation provides a broad definition of the types of programs from which these unqualified aliens are barred.[11]

Fourth, *the new welfare law dramatically alters states' authority to set eligibility rules for immigrants.* It gives states new flexibility to determine eligibility for legal immigrants for three major programs, AFDC (or Temporary Assistance for Needy Families — TANF — which replaces AFDC under the new welfare reform law), Medicaid, and the Title XX Social Services block grant. It also grants the states the power to restrict legal immigrants' access to their own-funded public benefit programs.

Fifth, *the legislation requires that service providers verify that those applying for federal public benefits are qualified aliens.* Although states already verified the eligibility of non-citizens for most of the major benefit programs, the new law expands these verification requirements to a much broader set of organizations and programs.

A. Reforms Not Enacted

Although these recent policy changes are quite far-reaching, it is also worth noting that a number of equally far-reaching proposals advanced in earlier welfare and immigration bills did not become law. (They are, however, likely to be taken up again in the next Congress.) A proposed 40% reduction in legal immigration levels was pulled out of a comprehensive immigration bill, voted on separately, and to many observers' surprise, defeated. A proposal to allow states to bar undocumented immigrant children from public schools was stricken from the illegal immigration bill in order to ensure Presidential approval. Proposals that would have extended sponsor-to-alien deeming beyond citizenship were abandoned, along with proposals that would have required that sponsors have incomes equal to at least 200% of the poverty line — a requirement that would have made it impossible for one half of U.S. citizens to sponsor a family member.

B. Many Choices and Questions Remaining

It is a generally unappreciated fact that much of the final shape and impact of the reforms depend on a series of crucial, defining actions still to be taken by both federal and state governments. Of these, perhaps the most important is how the Executive Branch will choose to define the scope of the means-tested federal benefits programs from which future legal immigrants will be barred. A narrow definition would include only a handful of programs; a broad one would fold in the 60 or more programs once specified in the Personal Responsibility Act. Similarly, the breadth of the safety net provided to illegal and other "not qualified" immigrants depends on how the opaque phrase "federal, state and local public benefits" will be defined.

Beyond these definitional choices, the legislation explicitly leaves it to states to decide whether qualified immigrants will be eligible for TANF, Medicaid and Title XX Social Services. As of this writing, only five of the 30 states that have submitted plans for implementing TANF intend to bar legal immigrants from the program.

In addition, other far-reaching implementation decisions will need to be made. This will include determing the criteria the federal government will use to establish that someone has worked 40 quarters. States must decide how quickly they will begin implementing the new immigration restrictions. (Thus far, only California, which tried to cut off undocumented women from receiving state-funded prenatal care, has moved to bar undocumented immigrants from state services.) Federal and state governments will have to determine how rigorously they will monitor whether programs are correctly verifying status.

The law's impacts, both in terms of federal budget savings and the number of people affected, depend on the extent to which immigrants naturalize, which, in turn, depends on the success of the Immigration and Naturalization Service (INS) in processing the growing numbers of naturalization applications. The INS's implementation of a new waiver for the disabled from the required English and civics tests, as well as a waiver for those who cannot afford the $95 application fee will affect many benefits recipients, since large numbers are poor, disabled and non-English speaking. Whether immigrants will be naturalized quickly enough to avoid losing benefits may also be affected by a new INS initiative to institute stricter FBI checks of each applicant's criminal background.[12]

Finally, the considerable impacts of the bill may be tempered if the Clinton Administration keeps its pledge to fix, or at least soften, the immigrant restrictions. Although it appears unlikely that new legislation will be enacted that reverses the broad changes made, the Administration could make marginal improvements to the bill by, for example, exempting some of the most vulnerable populations (*e.g.*, disabled SSI recipients) and by defining key terms narrowly.

III. Expected Impacts of Reforms

The many decisions still to be made regarding definitions, eligibility, and implementation make it difficult to assess the impacts of the new welfare law. Some data, however, are available that provide a glimpse of possible effects on individuals, poverty and on states.

Perhaps the most telling figure is the Congressional Budget Office's (CBO) calculation that 44%of the $54 billion in estimated savings from the welfare bill can be attributed to the bars on immigrant eligibility. Although immigrants represent only about 5% of all welfare users, they account for nearly half of the savings from welfare reform.

The bars on SSI and food stamps to both current and future legal immigrants will result in the loss of benefits for significant numbers of people. The CBO estimated that approximately 500,000, or three-quarters of current non-citizen SSI recipients would lose their benefits under the new restrictions. They also estimated that about 1,000,000 current non-citizen food stamp recipients, or about 56% of all non-citizen recipients, would lose benefits.[13]

These restrictions are likely to affect some of the most vulnerable immigrant populations. Although much of the rhetoric behind the restrictions for SSI focused on keeping newly arrived elderly immigrant parents off of the welfare rolls, 40% of immigrants who receive SSI are disabled.[14] In addition, the bar on food stamps is likely to affect large numbers of immigrant children: 64% of food stamp households headed by a non-citizen contain children.[15]

The eligibility restrictions on SSI are also likely to have a direct effect on immigrants' eligibility for Medicaid. Many SSI recipients receive Medicaid through their eligibility for SSI. When they lose SSI they lose Medicaid, unless they can establish eligibility some other way. The CBO estimates that about 300,000 immigrants will lose Medicaid eligibility by 1998.[16] About 165,000 legal immigrants may lose access to Medicaid as a result of the SSI bar and another 135,000 will lose Medicaid because of the restrictions on unqualified aliens and the five-year bar on future immigrants.[17] These figures, however, represent a comparatively small share of the more than two million non-citizens covered by Medicaid in 1995.[18]

The restrictions on immigrant eligibility for benefits are also likely to move significant numbers of families into poverty — families that contain both citizens and non-citizens. A study conducted by the Urban Institute estimated that the immigrant restrictions in the welfare bill will account for nearly half of the persons — 1.2 out of 2.6 million — estimated to be moved into poverty as a result of the law. The bars on immigrants also account for 450,000 of the 1.1 million children expected to be pushed into poverty because of the new law.[19] These figures include both citizens and non-citizens because of the large share of non-citizen-headed households that contain citizens (50%).

Because immigrants are so heavily concentrated in just a handful of states, the impacts of the eligibility restrictions on immigrants will also be highly concentrated. Forty-one percent of all non-citizen SSI recipients live in California, while another 33% live in New York, Florida and Texas.[20] Further, several of the states containing large numbers of immigrants have comparatively high benefit levels, including California and New York. As a result, those states are slated to lose even larger amounts of federal money and, if they provide state-funded assistance to immigrants, their costs of providing assistance to immigrants will also be higher relative to other states.

IV. Policy Implications

In this section we explore some of the more and less remarked upon implications of the recent changes to immigrant eligibility for public benefits. We examine their implications for *individuals* — for social membership and citizenship, access to the social safety net, and for integration. We then sketch some of their implications for *institutions* — for federalism and for the agencies that provide benefits to immigrants.

A. Membership and Citizenship

By drawing the kind of bright line between legal immigrants and citizens that was formerly drawn between illegal and legal immigrants, our social welfare policies now single out legal immigrants and their families for harsher treatment than the other poverty populations who will lose benefits under welfare reform. For immigrants, welfare reform represents more than an alternative service delivery model; it represents a fundamental redefinition of their membership in the society. By imposing new restrictions on non-citizens' access to a host of federal, state, and local benefits ranging from income support to higher education assistance, welfare reform demotes the civic status of legal immigrants. It does so by conditioning membership (in the form of access to public benefits) on citizenship, military duty, or sustained work (40 quarters or 10 years) in covered employment.

Legal permanent residents are not the only class of immigrants to have their civic status effectively demoted by welfare reform. By segmenting the immigrant population into two broad categories — "qualified" and "unqualified" immigrants — the law seeks to make the rules governing aliens' rights to benefits clearer and simpler than they have been. But by taking this approach, the law expressly relegates several classes of immigrants in the U.S. lawfully (such as applicants for asylum or adjustment of status, or aliens granted temporary protected status), to the same "unqualified" status as the undocumented.[21] It thereby blurs distinctions between immigrants here with the government's consent and those here without it.[22]

One of the principal ways that welfare reform redefines membership is *by transforming the meaning of citizenship.* Welfare reform may represent the most important — if largely undebated — reconsideration of the importance of citizenship since the passage of the Fourteenth Amendment. By making citizenship the gateway to benefits ranging from Medicaid to mental health to child care services, welfare reform makes citizenship important in a nation where its value has been extremely limited. In the past, citizenship has been required only to exercise political rights (*e.g.,* to vote and hold office), to hold some government jobs, and to make it easier to bring immigrants' relatives to the United States. But access to the welfare state has not generally turned on citizenship. Now, in the wake of welfare reform and the reductions in due process protections set out in illegal immigration reform, not only is citizenship the gateway to public benefits, it also represents a shield against the immigrant's expanded vulnerability to deportation. Viewed together, these changes beg the question of whether it is rational policy to induce citizenship out of fear or expediency rather than allegiance to the nation.

The new distinctions between differing classes of immigrants and natives created by welfare reform raise a number of practical and equity concerns. By differentiating between newcomers and natives, the new law could deepen existing divisions within American society. It may also deepen divisions within families by making differing streams of benefits (*e.g.,* food stamps, income support, Medicaid) available to citizen and non-citizen family members. In particular, older children born outside the U.S. who are non-citizens may find themselves disadvantaged relative to their younger citizen siblings. These divisions within families may be aggravated by the immigration reform's restrictions on adjustment of status (*e.g.,* restrictions making suspension of deportation more difficult, or dismissing any outstanding legal claims for legalization under the 1986 amnesty program) that will make it harder for undocumented family members to legalize.

Further, it is not yet clear whether states will have the legal authority to discriminate among differing classes of "qualified" immigrants in determining eligibility for services. Although a state may not want to provide state assistance to all qualified aliens, it may wish to protect certain immigrant populations, such as children.[23] The states will not only face constitutional constraints in their ability to draw distinctions between subclasses of legal immigrants, but the authorizing legislation for programs such as Medicaid may make such fine classifications impossible.[24]

B. What Remains of the Social Safety Net?

At the most basic level, the immigrant restrictions built into welfare reform remove the social safety net from some of the most vulnerable members of the immigrant community. These include:

- non-citizen children receiving food stamps;
- elderly non-citizens receiving SSI;
- disabled non-citizens receiving SSI; and
- refugees who have been in the U.S. for five years or more who continue to suffer from physical or psychological impairments as a result of their war experiences.[25]

The particular policy instrument used to restrict immigrants' access to many benefits will also affect the extent to which the safety net is available to immigrants. Simply put, these bars will remain in place regardless of need — applying with equal force to disabled, single adults and to elderly immigrants with intact family members able to help support them. These bars represent a sharp departure from the deeming restrictions on immigrant use of public benefits that were in place prior to welfare reform. While deeming shifted responsibility for immigrant support to the sponsor for a period of years, if the sponsor went bankrupt or died, the immigrant could still receive services. Since program bars preclude such need-based exceptions, immigrants will have to find other sources of support.

One strategy taken by welfare reform's framers to try to mitigate the law's impact was to create a set of population exceptions. These exceptions could be viewed as reflecting the greater equities that some classes of immigrants are perceived to have to benefits. Thus, benefits eligibility has not been curtailed for *veterans* because of the sacrifices they have made; *immigrants who have worked for 40 quarters* because of their contributions to the labor market and public coffers; and *refugees, asylees, and aliens* *whose deportation has been withheld* because of their special needs and the express consent the nation has shown to their presence.

The new illegal immigration reform bill also exempted two other groups. Battered women and children who are unqualified aliens are made eligible for the same programs as qualified aliens, and legal immigrant battered women are exempted from deeming. Legal immigrants who are abandoned by their sponsors who would otherwise go without food or shelter can receive a one-year reprieve from deeming.

In addition to these population exceptions, the framers of the welfare law built in a number of program exceptions for qualified immigrants, reflecting a mix of safety net, and, as we indicate below, human capital concerns. These include:

- emergency medical care under Medicaid;
- short-term, non-cash emergency relief;
- services provided under the National School Lunch Act;
- services provided under the Child Nutrition Act;
- immunizations and testing and treatment for communicable diseases;
- foster care and adoption assistance;
- student assistance under the Higher Education Act or Public Health Service Act;
- means-tested programs under the Elementary and Secondary Education Act;
- Head Start; and the
- Job Training Partnership Act.

Congress also carved out a limited number of program exemptions that apply to "not qualified" aliens. The excepted programs are a subset of the programs available to qualified immigrants:

- emergency medical care under Medicaid;
- short-term, non-cash emergency relief; and
- immunization and testing and treatment for communicable diseases.

Both qualified and unqualified immigrants remain eligible for a variety of community programs that:

- provide in-kind assistance;
- are delivered at the community level;
- do not base eligibility on income; and
- provide assistance necessary for the protection of life and safety.

The reach and effectiveness of this exception — like the other definitional issues noted above — depends on how broadly it is defined through regulation.

These exceptions suggest that the safety net that has been expressly erected for qualified (and for unqualified immigrants, for that matter) is driven by public health and child nutritional concerns, and by concerns about the possible hunger and homelessness that might result from welfare reform.

Viewing the welfare reform law more broadly, it becomes clear that many of the safeguards intended to moderate the law's impacts on citizens will not benefit non-citizens. For example, although there is a lifetime limit of five years on receipt of benefits under TANF, refugees are allowed to receive benefits for only their first five years in the United States. Thus, a refugee who receives benefits for two years and goes off welfare cannot go back on three years later as a citizen would be able to do. This inequity may provide a perverse incentive for refugees to seek benefits for longer periods, while they still remain eligible.

While federal law permits states to exempt 20% of their caseload from the five year time limits because of hardship, no hardship exemption can be extended to non-citizens. Further, a provision exempting child-only units (in which payments are provided only to the children in the unit and not the parents) from the five-year limit on TANF payments is of little value to legal immigrant children, who will be ineligible for benefits.

C. What Is the Impact on Immigrant Integration?

In addition to the straightforward safety net concerns, we would add the less-noted concern that welfare reform could delay immigrant social and economic integration.

Take, for example, restrictions imposed on immigrant use of Medicaid. According to a recent study, although low-income Latino immigrants are less likely to have low-birth weight babies than low-income native women, the prevalence of illness among San Diego's low-income Latino infants born in Mexico was comparable to that of non-Latino infants raised in central Harlem and other disadvantaged communities.[26] Moreover, the infants experienced high rates of illness despite the widespread availability of public health insurance coverage (Medi-Cal) and timely well-baby check-ups.[27] Presumably, these health outcomes would be worse in the absence of such care and insurance, potentially inhibiting the healthy development of these children and reducing their school participation and success.

Just as welfare reform addresses safety net concerns, the law also addresses human capital and other immigrant integration issues. Not surprisingly, the programs that are safeguarded are only available to the legal immigrant or qualified alien population. These programs include preprimary education (Head Start); means-tested programs in elementary and secondary education; federal loans and grants for higher education; and access to Job Training and Partnership Act (JTPA) programs.

But while these are clearly liberalizing provisions intended to protect programs that represent the proverbial "hand-up" rather than "hand-out" type of benefits, they produce a number of anomalous policy results. If it makes sense to pursue immigrant integration as an objective, why allow non-citizen children to participate in Head Start, but give states the option of barring them from child care programs funded under the Title XX Social Services block grant? Why protect employment and training services delivered under JTPA, while restricting job training financed under Title XX? Why permit states to deem sponsors' income for higher education loans and grants?

Further, looking beyond welfare reform, it could be the case that new provisions in the illegal immigration law make it more difficult for legal immigrants to challenge discrimination they may encounter when seeking to enter the labor force. These new provisions loosen anti-discrimination protections put in place by earlier legislation.

D. How Well Does Welfare Reform Address Federalism Concerns Raised By Immigration?

The new welfare reform law is striking not only for the new lines it draws between classes of immigrants, but for the power it vests in states to draw those lines. In this regard, welfare reform represents a reversal of Supreme Court doctrine that barred states from discriminating on the basis of legal status or alienage in their public benefit programs.[28] The law allows states to decide what mix of services they will extend to legal non-citizens and what tools they will use (*e.g.,* bars, deeming) to do so. In short, the states will now play a central role in determining societal membership — a right that was formerly reserved to the federal government.

The concept of federalism that animates the immigration provisions of welfare reform, however, can be viewed as somewhat schizophrenic, reflecting a tension between the competing imperatives of devolution and curtailing illegal immigration. In general, states have been given greater flexibility when it comes to determining legal immigrants' eligibility for public benefits, but less flexibility when it comes to policies affecting illegal immigrants. Constitutionality concerns, however, surround both sets of changes.

Welfare reform constrains state discretion in at least three ways. First, the law bars unqualified aliens from state and local services. States can only extend benefits to unqualified immigrants if they pass a law expressly authorizing themselves to do so (existing laws do not count for this purpose; in other words, the authorizing laws must be enacted after passage of the welfare reform law). However, no sanctions were written into the welfare reform law states that do not comply with this constitutionally dubious provision.[29] Second, states are barred from retaining "sanctuary laws" that prohibit state or local personnel from communicating with the INS. This prohibition has already provoked a Tenth Amendment challenge by New York City's Mayor Rudolph Giuliani.[30] Third, state agencies administering federal housing, SSI, and TANF programs must furnish the INS, four times each year, with the name, address, and other identifying information on aliens the state "knows are unlawfully in the United States."[31]

Debates over federalism have not only focused on questions of authority, but also money. As we have seen, welfare reform reshuffles federal and state roles, leading to mixed results when it comes to new state discretion over immigrants' benefits. In the fiscal domain, the results may be quite different — leaving states without even a mixed victory. What began as an effort to secure impact aid that would offset immigration's costs, has yielded new restrictions on immigrants' access to services which, ironically, could exacerbate rather than improve the intergovernmental fiscal inequities that flow from immigration.[32]

Overall, according to the CBO estimates, the federal government will be sending about $23 billion less to state and local governments as a result of the immigrant restrictions.[33] The effects of these reduced flows will be heavily concentrated within a few states. By its own analysis, California alone stands to lose $6.8 billion over the next six years.[34] Further, the two federal programs from which current and future immigrants are barred — SSI and food stamps — are financed with federal funds, limiting possible savings to states.

Moreover, it could be the case that the political impetus for providing states with impact aid has been shunted aside by welfare reform. In fact, the recently enacted illegal immigration reform bill contained a provision for 100% reimbursement to public and some non-profit hospitals that provide emergency care to unlawfully present immigrants. However, no funds were appropriated for any such reimbursement for the current fiscal year.

Devolution to the states will inevitably lead to further devolution to counties and other local units of government, possibly driving new fiscal arrangements. In California, for example, the General Relief Program is 100% county-funded, leaving only counties to pay for the cash assistance to needy immigrants that was previously funded primarily by the federal and state governments. Although the legislation gives states the authority to bar immigrants from state and locally funded programs, California's counties are required by state law to be the provider of last resort.

Finally, it is clear that devolution will exaggerate differences among states in the amount of safety net services available — to immigrants as well as other populations. The safety net services available to immigrants in New York are likely to be quite different from those provided in Texas. In Texas, unlike New York, immigrants losing federal benefits have no General Assistance program to turn to. Moreover, unlike New York and most other states, Texas has very few optional Medicaid categories under which the state can provide coverage once an immigrant's SSI eligibility is terminated.[35]

E. What Impact Will Welfare Reform Have on Implementation and Verification?

In addition to federalism concerns, the new welfare reform law's immigrant restrictions raise a number of other institutional issues. In the first place, the immigration provisions substantially expand the number of benefit-granting agencies that must verify the legal status of claimants in order to determine if they are "qualified." Prior to the passage of welfare reform this verification requirement was limited to a few major federal programs such as AFDC and food stamps. While the framers of the illegal immigration reform bill made clear that non-profits would not be subject to these verification requirements, it remains to be seen whether they will nonetheless be forced to verify in order to be reimbursed for federal or state-funded services rendered.

This expanded verification is illustrative of the ways in which efforts to control illegal immigration and mitigate immigration's impacts are altering the day-to-day working of domestic institutions. In that sense both welfare reform and illegal immigration control can be seen as conscripting a widening circle of state and local officials into service as what has been termed "junior immigration inspectors." Thus, for example, welfare reform enlists the service of a host of benefits providers that previously had been exempt from these obligations. Similarly, the illegal immigration reform bill permits the federal government to deputize state police and other law enforcement officials to serve as immigration inspectors.

At another level, welfare reform will mean that intake workers will administer not one but a host of new eligibility regimes, compelling them to identify:

- non-citizens (versus citizens)
- qualified (versus unqualified) aliens;
- lawfully present aliens for the purpose of qualifying for Social Security;
- immigrants who arrived before (versus after) August 22, 1996;
- immigrants arriving after August 22, 1996;
- refugees and asylees in the U.S. less than five years;
- immigrants who have worked 40 quarters in covered employment;
- sponsored immigrants (versus those without sponsors);
- immigrants whose sponsors have abandoned them or whose support levels are so low as to deny them adequate food and shelter; and
- veterans, their spouses, and children.

From an implementation standpoint, these subtle, often hard-to-police distinctions demonstrate how complex it will be for public and private institutions to screen for benefits eligibility. Further, the new verification imperatives beg the question of whether poor natives can readily produce evidence of citizenship. (After all, few common documents that most people carry prove citizenship.)

The complexity introduced by the new law imposes heavy information demands on government. These demands led the framers of both the welfare and illegal immigration reform bills to authorize the creation of linked electronic verification systems to determine legal status and citizenship. As a consequence, both move the nation toward a system where all individuals will have to provide information on their citizenship and legal status to a much broader set of service providers and law enforcers. Some would also argue that these changes also move us closer to a national identity card.

Finally, there will be a continuing tension between the goal of restricting unqualified immigrants' access to benefits and promoting the public health. Requirements that agencies report, or at least be allowed to report, information to the INS about aliens known to be unlawfully in the United States — as well as the verification requirements themselves — are likely to chill unqualified aliens' willingness to be tested and to receive treatment for communicable diseases or emergency medical services.

Conclusions

Taking a step back and examining the many far-reaching policy shifts embodied in the welfare law as well as the illegal and anti-terrorism laws, it becomes clear that the 104th Congress has moved us closer than ever before to a new era in immigrant and immigration policy. The three laws dramatically restrict the benefits, individual rights, and due process protections available to both illegal and legal immigrants. In the process, they draw a new, hard line between citizens and non-citizens, treating non-citizens more uncharitably than they have been treated since the nativist period of the early 20th century.

Through the exemptions to the broad bars on immigrants' eligibility for benefits, the welfare reform law has effectively created new criteria for membership in U.S. society. The only legal immigrants to have access to the same safety net as the rest of the population are those who have shown a strong attachment to the U.S. labor force by working (and presumably paying taxes) for 10 years, those who have served honorably in the U. S. military, and those who were admitted to the U.S. for humanitarian reasons. The latter group's membership is actually significantly diminished under the new law, which limits their eligibility for services to their first five years in the country.

The programmatic exemptions to the bars have left a minimal — and not always coherently designed — safety net for immigrants. The services for which they remain eligible relate solely to public health, child nutrition, and emergency services. An investment in legal immigrants' future integration is maintained, to some extent, through continued eligibility for selected human capital programs such as job training. The extent of the social safety net that remains in place for non-citizens depends, however, on a series of important decisions that have yet to be made in federal, state, and local legislation, regulation and implementation.

In addition to rewriting the criteria for membership and shrinking the safety net, the new laws have reshaped the role of the immigrant family. They have done so in two ways. First, they impose more stringent income requirements on those who wish to bring relatives to the United States. Second, the bars on eligibility and the new deeming requirements place responsibility for the support of needy and disabled immigrants squarely on the shoulders of their families, who are expected to bear a burden far greater than that borne by citizens' families.

The three new laws hold great significance not only for immigrants and their families but also for the roles that federal, state, and local governments play in immigration policy. The devolution of responsibility to state and local governments for setting immigrant policy and implementing immigration policy can be viewed as a major challenge to the principle of federal preemption that has controlled in this area. The approach taken, however, is two-pronged, with states gaining authority over decisions regarding legal immigrants' eligibility for services and losing authority when it comes to illegal immigrants.

All levels of government will now have greater access to information about both citizens and non-citizens and will be required to use that information when providing a much wider set of public services. The welfare law authorizes some state and local workers, and requires others, to report to the federal government information about those not lawfully in the United States.

Taken as a whole, these new laws attempt to reduce any negative fiscal and economic effects of legal immigration through domestic or welfare policy rather than through immigration policy — *i.e.*, by reducing the number, or changing the composition, of legal immigrant flows. These changes are also a departure from immigration reforms of the past three decades in that they are solely exclusionary and do not reflect the balance that previous immigration reforms maintained between inclusionary and exclusionary pressures.

Of course, it is significant that the numbers of immigrants coming to the United States have not been reduced and that immigration continues to be primarily for the purpose of family reunification. The United States still has a relatively liberal immigration policy by historical and international standards when it comes to how many immigrants it admits. But in terms of the welcome the nation provides to immigrants, its arms are no longer open quite so wide.

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Endnotes

[1] Public Law 104-193.

[2] Public Law 104-208.

[3] Public Law 104-132.

[4] For a discussion of the cumulative impacts of limits on legal immigration and restrictions on immigrant eligibility for benefits *see* Michael Fix and Wendy Zimmermann, "Immigrant Families and Public Policy: A Deepening Divide." The Urban Institute, November 1995.

[5] The Immigration Reform and Control Act of 1986 (IRCA) imposed sanctions on employers who hired illegal immigrants. At the same time it established a one-time amnesty program for illegal immigrants.

[6] *See generally,* Peter Schuck, "The Transformation of Immigration Law," 84 *Columbia L. Rev.* , Vol. 1, January 1984.

[7] Michael Fix, Jeffrey Passel, with Maria Enchautegui and Wendy Zimmermann, "Immigration and Immigrants: Setting the Record Straight," The Urban Institute, 1994.

[8] SSI is a cash assistance program for the elderly, blind, and disabled.

[9] *See* Michael Fix, Jeffrey S. Passel, and Wendy Zimmermann, "The Use of SSI and Other Welfare Programs by Immigrants," testimony before the U.S. Senate Subcommittee on Immigration," February 6, 1996; and "Facts About Immigrants' Use of Welfare" The Urban Institute, March 1996, updated April 1, 1996.

[10] The immigration legislation requires the person petitioning to bring a relative into the U.S. to sign the affidavit of support, but if the petitioner cannot meet the income requirement, the law permits another person with sufficient income to also submit an affidavit.

[11] The legislation defines public benefits as any retirement, welfare, health , disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any similar benefit for which payment or assistance is provided to an individual, household or family eligibility unit by an agency of the U.S., state or local government, or by appropriated funds of the U.S., state, or local government. (Sections 401, 411)

[12] Generally, immigrants currently receiving food stamps or SSI will not actually lose benefits until the summer of 1997.

[13] Congressional Budget Office, "Federal Budgetary Implications of H.R. 37334, The Personal Responsibility and Work Opportunity Reconciliation Act of 1996," August 9, 1996. The authors of this report note that these estimates depend on a number of assumptions that may not hold true. For example, although the CBO builds into their estimates assumptions about people who would naturalize and therefore retain eligibility, it is difficult to know how many people will choose to and be able to successfully naturalize. The data on which these estimates are based are also imperfect. For example the SSI data include an unknown number of persons who became citizens after enrolling in SSI but for whom the Social Security Administration did not update their citizenship status.

[14] Elsa Ponce, "Lawfully Resident Aliens Who Receive SSI Payments: December 1995," Office of Program Benefit Payments, Social Security Administration, February 1996.

[15] Suzanne Smolkin, Mike Stavrianos, and Joe Burton, "Characteristics of Food Stamp Households: Summer 1994," Office of Analysis and Evaluation, Food and Consumer Service, U.S. Department of Agriculture, April 29, 1996.

[16] This figure would be significantly higher if states took the option they are provided under welfare reform to bar their legal immigrant populations from the program.

[17] Conversation with authors of Congressional Budget Office Report, November 1996. Certain groups of immigrants who previously were eligible for Medicaid are considered "not qualified aliens under the new law and are no longer eligible. They include immigrants who are considered permanently residing under color of law

(PRUCOL) such as aliens granted an indefinite voluntary departure, a stay of deportation, or suspension of deportation.

[18] Medicaid coverage is based on data from the March 1996 Current Population Survey.

[19] Sheila Zedlewski, Sandra Clark, Eric Meier, and Keith Watson, "Potential Effects of Congressional Welfare Reform Legislation on Family Incomes," The Urban Institute, July 26,1996.

[20] Elsa Ponce, 1995.

[21] Charles Wheeler, "The New Alien Restrictions on Public Benefits: The Full Impact Remains Uncertain" 73 *Interpreter Releases,* 1245, September 23, 1996.

[22] Sharp distinctions drawn between aliens deemed to be "qualified" and "unqualified" when it comes to "federal means-tested benefits" are blurred when it comes to determining eligibility for Social Security. For those benefits new distinctions are created between aliens who are "lawfully present" and those who are not. "Lawfully present" aliens include asylum applicants granted work authorization; and aliens granted temporary protected status, among others. *See* Wheeler, *id.* at 1251.

[23] The Governor of Maryland has said he wishes to do just that, by providing state-funded food stamps for immigrant children.

[24] The welfare bill does not repeal Medicaid rules requiring states to provide the same "amount, duration and scope" of medical services to all who qualify for assistance based on each state's rules. Charles Wheeler and Josh Bernstein, "New Laws Fundamentally Revise Immigrant Access to Government Programs: A Review of the Changes." National Immigration Law Center, 1996, at 7.

[25] Because asylees and refugees do not enter the U.S. as sponsored immigrants, they will not be subject to federal or state deeming requirements after their five years of program eligibility has lapsed. Presumably they would be subject to any state imposed bars on non-citizens benefit eligibility.

[26] Sylvia Guendelman, *et. al.* "Infants of Mexican Immigrants, Health Status of an Emerging Population," 33 *Medical Care,* No. 1, 1995. pps. 41-52.

[27] *Id.* at 50.

[28] *See Graham v. Richardson,* 403 U.S. 365 (1971).

[29] *See* Erwin Chemerinsky, "Memorandum on the Constitutionality of Section 411(d) of H.R. 3734." September, 1996. At issue is whether the federal government can infringe the states' sovereignty by compelling them to enact legislation in an area of policy that federal government has not itself preempted.

[30] The Tenth Amendment provides that powers not delegated to the federal government or prohibited by the states are reserved to the states.

[31] It remains to be seen how broadly this knowledge requirement will be interpreted. Under current agency and Congressional interpretation such knowledge does not arise until the alien is under a final order of deportation. Only the food stamp program now requires reporting of household members. *See generally,* Wheeler and Bernstein.

[32] According to some scholars, immigration generates a net surplus for the federal government, a net deficit for local governments, and mixed results for state governments, depending on the state's differing tax and service structure. *See* Eric S. Rothman and Thomas J. Espenshade, "Fiscal Impacts of Immigration to the United States," *Population Index,* Volume 58, Number 3, 1992.

[33] Congressional Budget Office, 1996.

[34] California Legislative Analyst's Office, "Federal Welfare Reform (H.R. 3734): Fiscal Effect on California," Policy Brief, August 20, 1996.

[35] One such optional category is for the "medically needy," which provides Medicaid eligibility to those with incomes slightly higher than the standard income threshold.

Chapter XII

The Clinton Administration and The Americans with Disabilities Act

by Sharon N. Perley and Chai R. Feldblum[1]

Introduction

During his first campaign for the Presidency, then-candidate Clinton promised "to work to ensure that the Americans with Disabilities Act (ADA) is fully implemented and aggressively enforced — to empower people with disabilities to make their own choices and to create a framework for independence and self-determination."[2]

For the most part, the President has kept his promise. The first term of the Clinton Administration has been responsible for a number of "firsts" under the ADA — ranging from the first ADA lawsuits brought to trial by both the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ), to some of the first ADA decisions at the federal appellate level, to the first certification of a state building code to meet the ADA Standards for Accessible Design. Key Clinton appointees — in particular, Janet Reno and Deval Patrick — have been outspoken supporters of the rights of persons with disabilities. And the Administration has been more accessible and responsive to disability rights advocates than any of its predecessors.

While the Administration should be commended for its efforts with respect to the ADA, much still needs to be done. This chapter examines the first term of the Clinton Administration — its successes and shortcomings — in implementing and enforcing the ADA, and provides recommendations for the Administration's second term as it continues to enforce this important civil rights statute.

I. Enforcement

A. Litigation

To date, EEOC and DOJ (which share the bulk of federal enforcement responsibility for the ADA) have filed more than 180 ADA lawsuits — 159 under Title I, which prohibits discrimination on the basis of disability by private employers, three under Title II, which prohibits discrimination by state and local government entities, and 23 under Title III, which prohibits discrimination by places of public accommodation.[3] The Administration has intervened in an additional 15 suits, and has filed *amicus curiae* briefs in 80 cases.[4]

The types of ADA cases filed by the Administration have run the gamut. The EEOC is responsible for enforcing Title I of the ADA against private employers; the majority of its lawsuits, not surprisingly, have been termination or failure-to-hire cases.[5] The Commission also has challenged employers' discriminatory benefits policies,[6] failures to provide reasonable accommodations,[7] and unlawful disability-related inquiries.[8] The vast majority of the Commission's caseload has been individual (rather than pattern-or-practice) cases, and it has been based almost entirely on individual complaints filed with its local field offices.

DOJ has much broader enforcement responsibilities and, accordingly, its docket is much broader in scope. Cases filed by the Department range from those challenging the discriminatory treatment of persons with HIV/AIDS,[9] to those challenging public employers' failures to make reasonable accommodations,[10] to those filed against the franchisor, owners, architects, and contractors of a major hotel chain for violations of the ADA's new construction requirements,[11] to those challenging review courses' failure to provide appropriate auxiliary aids and services to students with vision and hearing impairments.[12] Like the EEOC, however, the Department's docket has been almost entirely complaint-driven.

Both agencies have been active *amicus curiae* in ADA suits brought by private litigants. Indeed, both the EEOC and DOJ have been most successful in advancing the development of ADA law via their *amicus* roles. Some of the EEOC's key successes include advancing the ADA's broad definition of employer to include health and welfare funds[13] and advancing the concept of "reasonable accommodations."[14]

Unfortunately, the Commission has not been as successful in advancing its interpretation of what it means to be a "qualified individual with a disability" through its *amicus* cases. The Commission's efforts notwithstanding, the federal judiciary has, to date, interpreted this threshold question extremely narrowly, thus denying the statute's protections to a class of people Congress arguably intended to protect. In some cases, the courts have wrongly construed what it means to be substantially limited in a major life activity.[15] In others, the courts have wrongly applied the doctrine of judicial estoppel, and have held that an individual who has certified that he or she is "totally and physically disabled" and "unable to work because of [his or her] disabling condition" is estopped from pursuing an ADA claim. The courts have wrongly reasoned that because the person has certified that he or she is "unable to work," he or she is not a "qualified individual with a disability" who can perform the essential functions of the job.[16]

DOJ also has had its successes and failures. Areas in which it has been successful as *amicus* include: ensuring that the scope of Title II coverage is interpreted broadly,[17] defending the constitutionality of the ADA,[18] using the ADA's integration requirements to challenge the institutionalization of persons with disabilities who would be more appropriately served in community-based programs,[19] and providing freedom from unnecessary inquiries into disabilities by state licensing officials.[20]

The Department has been less successful in advancing its argument that franchisors and architects should be held liable for violations of the ADA.[21] Courts have held that the *owners* of the place of public accommodation may be held liable for ADA violations. Contrary to the Department's position, however, the courts have held that entities who exercised control over the *design and construction* of the public accommodation, such as franchisors, architects, and contractors, may not be found liable under the ADA.[22] Like the EEOC, the Department has had some difficulties in advancing its interpretation of what it means to be a "qualified individual with a disability," in particular, what it means to be "regarded as substantially limited in a major life activity."[23]

Finally, with respect to their litigation efforts, EEOC and DOJ have been noticeably silent in a few areas. Most of these areas represent particularly difficult policy questions, and it is not surprising that the agencies have shied away from them. Nevertheless, the agencies' presence is sorely needed.

First, neither EEOC nor DOJ has filed a lawsuit or *amicus* brief on behalf of an HIV-infected health care worker. The silence of the agencies has let a disturbing trend continue, where several courts have concluded that scientific evidence notwithstanding, HIV-infected health care workers may be discriminated against because they pose a "direct threat" to the health and safety of their patients.[24] Not only are persons with HIV harmed, but the courts' misapplication of the direct threat analysis may have ominous ramifications in all sorts of other ADA cases in which the direct threat defense is invoked.[25]

Second, while EEOC has challenged a number of employee benefit plans that distinguish between disabilities (*e.g.,* health insurance plans in which the lifetime caps for HIV-related treatment are significantly lower than lifetime caps for other catastrophic illnesses), it has yet to challenge any health insurance plan that provides fewer benefits for mental disabilities than for physical disabilities. This failure derives from the Commission's interim policy guidance on disability-based distinctions in employer-provided health insurance, which suggests that plans which provide fewer benefits for the treatment of "nervous or mental conditions" as compared to those provided for the treatment of "physical conditions" do not contain disability-based distinctions. This guidance is mistaken and should be revised.[26]

Along the same lines, persons with mental disabilities are significantly underrepresented on EEOC's and DOJ's dockets.[27] This is due, in part, to the difficulties persons with mental retardation and mental illness have in advocating on their own behalf. Nevertheless, persons with mental disabilities are routinely stigmatized and discriminated against, and the agencies should be proactive in their attempts to eradicate such discrimination.

Lastly, while DOJ has received hundreds of complaints against medical care providers that refused to provide sign language interpreters for individuals who are deaf, the Department has yet to file a single lawsuit on this issue. This seems particularly odd in light of DOJ's strong policy guidance in this area, which explains that physicians must provide qualified sign language interpreters when necessary for effective communication. Only by litigating the issue, however, will DOJ be able to give its guidance any teeth.

B. Settlements and Alternative Dispute Resolution

Litigation constitutes only one aspect of the Administration's ADA enforcement efforts. Both the EEOC and DOJ have had great success in settling cases through consent decrees, formal settlement agreements, and informal settlement agreements. In addition, the agencies have participated in cases brought by private litigants and have effectively used their position to bring about successful settlements. Both agencies have also begun to use mediation as a means of alternative dispute resolution, and their pilot programs show much promise.

EEOC's settlement success is perhaps best demonstrated by the fact that it has secured approximately $117 million in monetary benefits for employees who were discriminated against on the basis of their disabilities.[28] This amount represents only those benefits obtained through its administrative processes, not through litigation. In many of these cases, the employee was reinstated, and in all of these cases, the employer agreed to cease its discriminatory practices.

DOJ's success is best demonstrated by the increase in accessibility in a whole host of venues.[29] As a result of the Department's efforts, the Atlanta Olympic Stadium is the most accessible sporting arena in the world. Two of the largest movie theater chains — Cineplex Odeon and United Artists — have agreed to make their theaters more accessible to persons with disabilities. Grocery stores, hotels, department stores, and restaurants have entered into both formal and informal settlement agreements with the Department and have opened their doors to persons with disabilities. A number of 9-1-1 telephone emergency services are now accessible to persons who use TDDs, and persons with disabilities have greater access to their town halls, courtrooms, and legislative chambers. Day care centers are beginning to accept children with disabilities, and some testing services have agreed to provide reasonable accommodations to students with learning disabilities.

Lastly, both the EEOC and DOJ have begun referring ADA complaints to mediation.[30] This provides complainants with quicker resolution of their cases and allows the agencies to work on decreasing their backlogs. More importantly, the use of alternative dispute resolution frees up resources at both EEOC and DOJ, enabling the agencies to target their enforcement efforts on cases that will have the greatest impact — *i.e.*, cases that will further the development of the law and/or affect a large number of persons with disabilities.

II. Technical Assistance

Both EEOC and DOJ have been active in providing technical assistance concerning the ADA's requirements. EEOC, for example, has issued extensive policy guidance, including guidance on: the definition of the term "disability," pre-employment disability-related inquiries and medical examinations, disability and service retirement plans, disability-based distinctions in employer-provided health insurance, the interaction of the ADA and worker's compensation, and the interaction of the ADA and the Family and Medical Leave Act. Much of this guidance has been disseminated to, and relied upon by, human resource and personnel offices throughout the country.

Just as DOJ's enforcement responsibilities are broader in scope than those of EEOC, so too have been their technical assistance efforts. In addition to providing policy guidance on legal issues arising under the ADA, DOJ has made extensive efforts to reach out to the public and educate them about their rights and responsibilities under the ADA. These efforts have included: providing direct technical assistance and guidance through the DOJ toll-free ADA Information Line, operating an ADA technical assistance grant program, coordinating ADA technical assistance government-wide, and disseminating ADA materials — including regulations, technical assistance documents on particular ADA issues, and ADA status reports — through the mail and via the Department's ADA Home Page on the Internet.

III. Certification

One often-overlooked aspect of the Administration's implementation efforts is DOJ's ongoing certification efforts. The ADA authorizes the Department to certify state and local building codes that meet or exceed the ADA Standards for Accessible Design. By ensuring that state and local codes comply with the ADA's requirements, the Department ensures, in essence, that all new construction within the code's jurisdiction complies with the ADA.

To date, the Department has certified two state codes — Washington and Texas. At least twelve other jurisdictions have requested certification as well. In addition to actually certifying building codes, the Department has worked closely with state and local officials as they have developed their codes. The Department has also responded to requests for review of model codes, and has provided informal guidance to private entities that have developed model accessibility standards.

IV. Conclusions and Recommendations

The Clinton Administration should be praised for its efforts during the first term in implementing and enforcing the ADA. If Congress' goals in enacting the statute are to become a reality, however, much still needs to be done:

- *Congress and the Clinton Administration should allocate greater resources for enforcement and implementation of the ADA.* There are an estimated 49 million Americans with disabilities. Yet the DOJ's Disability Rights Section — which has sole enforcement responsibility for Titles II and III of the ADA, as well as enforcement responsibility for violations of Title I by state and local employers — has only 21 trial attorneys. The EEOC has a significantly greater number of trial attorneys, yet also a far greater caseload, in that it enforces not only Title I of the ADA, but Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the Age Discrimination in Employment Act, and Section 501 of the Rehabilitation Act. (Still, the disparity between DOJ and EEOC is striking: whereas DOJ has only 21 trial attorneys who litigate cases under the ADA, EEOC has approximately 290; whereas DOJ has only 17 investigators who investigate ADA complaints, EEOC has 830.)

  People with disabilities appropriately look to the government to take the lead in enforcing the ADA. Most of these individuals do not have the resources to hire private attorneys. (With respect to Title III cases, there is an additional disincentive to filing private lawsuits, in that private litigants are not entitled to compensatory damages under Title III.) Even when people with disabilities have the resources to file private suits, most private attorneys do not have disability rights expertise. The civil servants at EEOC and DOJ should be commended for their herculean efforts in enforcing the ADA, but they can only do as much as their limited resources allow. Congress and the Administration should allocate sufficient resources so that the statute will be properly enforced.

- *The Administration should shift its emphasis from providing technical assistance to enforcing the law.* The focus of the first Clinton Administration was to educate the public about the ADA. The theory underlying this approach was that the ADA was a new statute, and if entities understood the law, they would voluntarily comply with its requirements. As the Clinton Administration enters its second term, this focus should now change. The ADA was enacted more than six years ago; businesses can no longer plead ignorance concerning their statutory obligations. While the Administration should continue to provide some technical assistance, the majority of its resources should be channeled into enforcing the ADA — in bringing cases that will affect the greatest numbers of persons with disabilities and further the courts' interpretation of the law.
- *EEOC and DOJ should each develop and implement specific enforcement agendas, which not only respond to the complaints of particular individuals, but address systemic issues of import to persons with disabilities.* To their credit, both the Department of Justice and the EEOC have been vigilant in responding to specific complaints filed by particular individuals. While resolution of these cases has improved access for the particular individuals who filed the complaints, such resolution often has done little to advance the rights of other persons with disabilities.

  Accordingly, EEOC and DOJ should ensure that their enforcement agendas represent a better mix of responding to complaints and taking on systemic issues. Both agencies should continue to respond to individual complaints, and should litigate when necessary. The agencies should, however, begin to refocus their efforts on developing and bringing cases that will have the most far-reaching effect. To that end, DOJ should exercise its compliance review authority more frequently, and EEOC Commissioners should exercise their Commissioner charge authority more often. EEOC and DOJ should also both develop testing programs, as a means of developing pattern-or-practice cases.
- *The Administration should continue to play an active* amicus *role in private ADA lawsuits.* For the most part, the courts have deferred to the Administration's interpretations of the ADA, both at the district court and the appellate level. Accordingly, the Administration should continue to play an active role as *amicus curiae* in suits brought by private litigants so as to ensure that the law is developed properly.
- *The Administration should continue to fund — and should expand — its mediation programs.* Mediation has proven extremely successful in the resolution of ADA complaints. The Administration should continue to fund such programs, so that the needs of persons with disabilities are more quickly addressed, and the agencies can target their resources on the cases that will have the most far-reaching effect. The Administration must ensure, however, that the mediation programs are voluntary, *i.e.,* that all parties must agree to enter into mediation, and are structured in such a way that all parties to the system are guaranteed a fair process.
- *DOJ should continue to certify state and local building codes.* By ensuring that state and local codes comply with the ADA's requirements, the Department ensures, in essence, that all new construction within the code's jurisdiction complies with the ADA. The Department should continue its efforts in this area.
- *The Administration should promulgate new regulations where necessary.* At least two current problems under the ADA can be resolved by regulatory action.

  First, the Social Security Administration should promulgate new regulations, or at least interpretive guidance, that a person who certifies that he or she is "totally or permanently disabled," and thus entitled to federal disability benefits, can still be "a qualified individual with a disability" under the ADA. The regulations should make clear that a person who certifies that he or she is unable to work because of his or her disability may very well be unable to work because of the *discriminatory* actions or perceptions of others. Such a clarification would allow an individual who is receiving disability benefits to still invoke the protections of the ADA — including its requirement that an employer provide reasonable accommodations — so that the individual can go back to work.

Second, DOJ should revise its Title II regulations so that federal agencies do not have to issue Findings Letters in every instance in which a Title II complaint is not resolved. The Title II regulation designates eight federal agencies as responsible for investigating complaints filed under Title II of the ADA. The regulation provides that the designated agency "shall investigate each complete complaint, attempt informal resolution, and, if resolution is not achieved, issue to the complainant and the public entity a Letter of Findings that shall include Findings of Fact and Conclusions of Law. . . ." 28 C.F.R. § 35.172(a). This requirement results in an unnecessary drain on resources and an almost unmanageable backlog of Title II complaints. Designated agencies should be able to exercise their prosecutorial discretion and should only have to issue Findings Letters where appropriate, *i.e.,* where there is a clear violation of the ADA that cannot be resolved informally.

- *The Administration should be vocal in its defense of the ADA, the Rehabilitation Act, and the Individuals with Disabilities Education Act (IDEA).* There is talk of efforts to cut back on the reach of the ADA and on the protections of IDEA, the law that guarantees a free and appropriate public education to all children with disabilities. The Clinton Administration should work vigorously to ensure that the substantive provisions of these laws remain intact.

Endnotes

[1] Ms. Perley served as a trial attorney in the Disability Rights Section, Civil Rights Division, U.S. Department of Justice during the first three years of the Clinton Administration. She is now is a Teaching Fellow at Georgetown University Law Center's Federal Legislation Clinic, where, among other things, she advises the Clinic's clients on legislative matters concerning disability rights. The views expressed in this essay are entirely her own. Ms. Feldblum is Associate Professor of Law at Georgetown University Law Center, Director of its Federal Legislation Clinic, and a leading expert on the Americans with Disabilities Act.

[2] Bill Clinton & Al Gore, *Putting People First,* at 82 (1992).

[3] These numbers were provided by the EEOC and DOJ, respectively. They represent cases filed as of September 30, 1996.

[4] *See* note 3.

[5] *See, e.g., EEOC v. P.M.K. Corp., d/b/a Cost Cutters of Austin,* No. A-94-CA-584-JN (W.D. Tex.) (termination on basis of HIV-positive status) (resolved by consent decree); *EEOC v. Gabbard & Co., Inc.* No. 94-CV-72976 DT (E.D. Mich.) (jury verdict in favor of employee terminated because of medical absence for cancer treatment); *EEOC & Charles Wessel v. AIC Security Investigations, Ltd., et al.,* No. 92-C-7330 (N.D. Ill.) (jury verdict in favor of employee terminated because he had brain cancer); *EEOC v. The Chrysler Corp.,* 917 F. Supp. 1164 (E.D. Mich. 1996) (failure to hire electrician with diabetes violates ADA as a matter of law); *EEOC v. Columbia Aluminum Recycling, Ltd.,* No. 94-C-00301 (N.D. Ill.) (failure to hire because of history of seizures) (resolved by consent decree); *EEOC v. Scrivner, Inc. — Kansas Div., d/b/a Jubilee Foods,* No. 95-1138-MLB (D. Kan.) (failure to hire because applicant was deaf) (resolved by consent decree).

[6] *See, e.g., EEOC v. The Gage Co.,* No. 94-CV-72089-DT (E.D. Mich.) ($5000 lifetime cap on medical coverage for AIDS-related treatment; $100,000 cap for all other catastrophic illnesses) (resolved by consent decree); *EEOC v. Allied Services Division Welfare Fund, Southern Pacific Lines,* No. 93-5076-WMB (C.D. Cal.) ($5000 lifetime cap on AIDS-related treatment; $300,000 cap for all other catastrophic illnesses) (resolved by stipulated settlement); *EEOC v. Mason Tenders Welfare Trust Fund, et al.,* No. 93-Civ.-3865 (JES) (S.D.N.Y.) (health care plan excluded medical coverage entirely for HIV-, ARC-, and AIDS-related treatments) (resolved by consent decree).

[7] *See, e.g., EEOC v. Pinnacle Holdings, Inc., d/b/a Villa Ocotillo,* No. CIV-95-0708-PHX RGS (D. Ariz.) (failure to accommodate employee's hearing impairment by failing to consider or analyze any type of accommodation) (resolved by consent decree); *EEOC v. Spectator Management Group,* No. 95-2688 (E.D. Pa.) (failure to accommodate HIV-positive employee's request for flexible schedule) (resolved by settlement); *EEOC v. Arrow Concrete Co.,* No. 6:94- 0940 (S.D. W.Va.) (failure to accommodate employee's request for light duty job or leave of absence following lymphoma treatment) (resolved by settlement).

[8] *See, e.g., EEOC v. Cooper Industries, Inc. d/b/a Maryville Forge,* No. 95-60210CV-53-6 (W.D. Mo.) (pre-employment application and screening process included disability-related inquiries and resulted in defendant's failure to hire individuals because of their records of disability) (resolved by consent decree).

[9] *See, e.g., United States v. Morvant,* 898 F. Supp. 1163 (E.D. La. 1995)(refusal to provide routine dental care on basis of patient's HIV-positive status violates ADA as matter of law); *United States v. Bekins Van Lines,* No. 95-6780 (E.D. Pa.) (moving company's refusal to provide moving services to individual whose friend was HIV-positive) (resolved by consent decree); *United States v. Castle Dental Center,* No. H-93-3140 (VDG)(S.D. Tex.) (dentist's refusal to provide care to patient with HIV) (resolved by consent decree).

[10] *See, e.g., United States v. City and County of Denver, Colorado,* No. 96-K-370 (D. Colo.)(jury verdict in favor of city employee refused reassignment as reasonable accommodation); *United States v. Louisiana Dep't of*

Public Safety and Corrections, No. 96-121-A-M2 (M.D. La.) (denial of reasonable accommodation to applicant for corrections officer position) (pending).

[11] *See United States v. Days Inns of America, Inc.*, No. 96-26 (E.D. Ky.); *United States v. Days Inns of America, Inc*, No. EV-96-28-C (S.D. Ind.); *United States v. Days Inns of America, Inc*, No. 96-2028 (C.D. Ill.).; *United States v. Days Inns of America, Inc.*, No. 96-5012 (D. S. Dak.); *United States v. Days Inns of America, Inc.*, No. S-96-260-WBS GGH (E.D. Ca.).

[12] *See, e.g., United States v. Harcourt Brace, d/b/a Bar/Bri Bar Review*, (N.D. Ill.) (resolved by consent decree); *United States v. Becker C.P.A. Review*, No. 92-2879 (TSH) (D. D.C.) (resolved by consent decree).

[13] *See, e.g., Carparts Distribution Center v. AWANE*, 37 F.3d 12 (1st Cir. 1993); *Mason Tenders v. Donaghey*, No. 93 Civ. 1585 JES (S.D. N.Y. November, 1993).

[14] *See, e.g., Feliberty v. Kemper Corp.*, 98 F.3d 274 (7th Cir. 1996); *Benson v. Northwest Airlines*, 62 F.3d 1108 (7th Cir. 1995).

[15] *See, e.g., Williams v. Avnet*, __ F.3d __, 1997 WL 682213 (4th Cir. 1996) (individual with back injury and 25-pound lifting limitation not substantially limited in major life activities of lifting or working and thus not protected by ADA); *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996) (individual with breast cancer neither substantially limited in major life activity of working nor regarded as substantially limited in major life activity of working and thus not protected by ADA); *Sanders v. Arneson*, 91 F.3d 1351 (9th Cir. 1996) (cancer-related psychological condition not substantially limiting). *But see Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170 (10th Cir. 1996) (individual with multiple sclerosis is substantially limited in major life activity of working and protected by ADA).

[16] *See, e.g., McNemar v. The Disney Store*, 91 F.3d 610 (3rd Cir. 1996).

[17] *See, e.g., Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996) (state quarantine program subject to Title II); *Innovative Health Systems, Inc. v. City of White Plains*, 931 F. Supp. 222 (S.D.N.Y. 1996) (zoning enforcement activities of local governments subject to Title II); *Armstrong v. Wilson*, __ F. Supp.__, 1996 WL 580847 (N.D. Cal. 1996) (state prison facilities subject to Title II).

[18] *See, e.g., Abbott v. Bragdon*, 912 F. Supp. 580 (D. Me. 1995); *Pinnock v. International House of Pancakes*, 844 F. Supp. 574 (S.D. Cal. 1993); cert. denied, 114 S. Ct. 2726 (1994).

[19] *See, e.g., Helen L. v. Didario*, 46 F.3d 325 (3rd. Cir. 1995), cert. denied, 116 S. Ct. 64 (1995).

[20] *See, e.g., Clark v. Virginia Bd. of Bar Examiners*, 880 F. Supp. 430 (E.D. Va. 1995); *Ellen S. v. Florida Bd. of Medical Examiners*, 859 F. Supp. 1489 (S.D. Fl. 1994); *Medical Soc'y of New Jersey v. Jacobs*, 1993 WL 413016 (D.N.J. 1993).

[21] *See, e.g., Neff v. American Dairy Queen Corp.*, 58 F.3d 1063 (5th Cir. 1995) (franchisor not liable for ADA violations), cert. denied, 116 S. Ct. 704 (1996); *Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, P.C.*, Civ. No. 96-1354 (TFH), slip op. (D.D.C. July 29, 1996) (architects not liable for ADA violations).

[22] *See* note 21. The Department, however, continues to advance its position in other fora. *See, e.g., United States v. Days Inns of America, Inc.*, No. 96-26 (E.D. Ky.); *United States v. Days Inns of America, Inc.*, No. EV-96-28-C (S.D. Ind.); *United States v. Days Inns of America, Inc.*, No. 96-2028 (C.D. Ill.).; *United States v. Days Inns of America, Inc.*, No. 96-5012 (D. S. Dak.); *United States v. Days Inns of America, Inc.*, No. S-96-260 WBS GGH (E.D. Ca.); *United States v. Ellerbe Becket*, No. 4-96-995 (D. Minn.); *Day v. Republic Foods*, No. 95-1317CV (D. D.C.).

[23] *See Bridges v. Bossier County, Louisiana*, 92 F.3d 329 (5th Cir. 1996) (applicant rejected for firefighter position because of mild hemophilia not person with disability).

[24] Note, however, that to its credit, EEOC has filed a number of other termination and/or denial of benefit cases on behalf of HIV-infected employees (*see, e.g., EEOC & John Doe v. Kohn, Nast, & Graf, et al.*, No. 930CV-4510 (E.D. Pa.); *EEOC v. Mason Tenders Welfare Trust Fund, et al.*, No. 93-Civ.-3865 (JES) (S.D.N.Y.)), and DOJ

has filed lawsuits and/or obtained settlements on behalf of HIV-positive individuals who had been denied medical care, funeral services, and moving services. *See, e.g., Morvant*, 898 F. Supp. 1163; *Bekins Van Lines*, No. 95-6780 (E.D. Pa.); *Castle Dental Center*, No. H-93-3140 (VDG) (S.D. Tex.).

[25] *Cf. Bradley v. University of Texas M.D. Anderson Cancer Center*, 3 F.3d 922 (5th Cir. 1993) ("cognizable risk of permanent duration with lethal consequences" rises to the level of direct threat, notwithstanding how small the risk may be).

[26] *See* Chai Feldblum, "The Employment Sector," in *Implementation of the Americans with Disabilities Act* 82-151 (J. West, ed. 1996) (criticizing EEOC guidance); Mary Giliberti, "The Application of the ADA to Distinctions Based on Mental Disability in Employer-Provided Health and Long-Term Disability Insurance Plans," 18 *Mental & Physical Disability L. Rep.* 600 (September/October 1994) (same).

[27] As of March 31, 1996, EEOC had filed only six lawsuits on behalf of persons with mental illness, and none on behalf of persons with mental retardation. DOJ has advocated in its briefs that persons with mental retardation should be placed in community settings where appropriate, and has successfully challenged state licensing boards' disability-related (in particular, mental illness-related) inquiries. Nevertheless, DOJ has done little to challenge the day-to-day instances of discrimination faced by persons with mental illness and mental retardation.

[28] Personal communication from Michael Widomski, Public Affairs Specialist, EEOC (December 16, 1996).

[29] *See* Department of Justice Status Reports on Enforcing the ADA for detailed descriptions of these settlements.

[30] DOJ has provided a technical assistance grant to the Key Bridge Foundation to train professional mediators in the legal requirements of the ADA and to mediate complaints referred by the Department under Titles II and III. Approximately 80% of the cases in which mediation has been completed have been successfully resolved. EEOC is currently establishing various mediation programs at the field office level. In addition, EEOC has a contract with the Federal Mediation and Conciliation Service and has referred ADA charges to the Service.

Chapter XIII

Assessing Employment Integration Under Title I of the Americans with Disabilities Act

by Peter David Blanck[1]

Introduction

Title I of the Americans with Disabilities Act (ADA), effective July 26, 1992, is the most comprehensive federal law to address employment discrimination against millions of Americans. The upcoming fifth anniversary of Title I during the second Clinton term is an appropriate time for reflection. Yet a primary requirement for such reflection — systematic evaluation of hard information about the lives of affected persons with disabilities — is still lacking.

No doubt, during the last five years dramatic changes have occurred in attitudes and behaviors toward individuals with disabilities in employment, as well as in governmental services, telecommunications, and public accommodations.[2] These changes, however, have not been adequately documented and communicated. Increasingly, adequate information is necessary to rebut the myriad of myths and misconceptions about qualified persons with disabilities, both in the employment context and elsewhere.[3]

This paper is intended to contribute to the emerging dialogue on ADA Title I implementation by highlighting information from an ongoing investigation of employment integration under the Act. The investigation seeks to foster meaningful and informed dialogue about Title I; raise awareness about the lives, capabilities, and needs of qualified job applicants and employees with disabilities; and help forestall or minimize disputes about Title I implementation by providing an information base for improving communication.[4]

I. Need for Long-Term Evaluation of ADA Title I

Long-term evaluation of the emerging workforce of qualified persons with disabilities is needed for several reasons. First, study of attitudes and behavior toward the workforce of qualified persons with disabilities may aid in long-term Title I implementation, as well as interpretation of recent and related policy initiatives during the Clinton first term, such as welfare, health care, and health insurance reform initiatives. The Health Insurance Reform Act of 1996, for instance, is written to ensure access to portable health insurance for employees with chronic illness or disabilities who lose or change their jobs.[5] Under the law, group health plan premium charges may not be based solely on disability status or the severity of an individual's chronic illness. The combined impact of the Health Insurance Reform Act and Title I on reducing employment discrimination facing qualified persons with disabilities is a promising area for study. Likewise, study is needed of the interaction of Title I with 1996 welfare reform law — for example, study of the potential impact of the requirement under welfare reform that the head of families on welfare must work within two years or lose benefits.[6]

Second, study limited to the analysis of litigation and the EEOC charges associated with Title I, while necessary, tends to focus discussion on the "failures" of the system, as opposed to strategies designed to enhance a productive workforce and identify potential disputes before they arise. Study of the impact of other social forces such as public opinion, politics, culture, and ideology on the law is necessary to determine Title I's ability to deliver on its promise to raise awareness of equal employment opportunity for qualified persons.

Third, evidence suggests that Title I implementation has coincided with larger numbers of qualified persons with severe disabilities participating in the workplace. In 1996, the U.S. Census Bureau released data showing that the employment to population ratio for persons with severe disabilities has increased from roughly 23% in 1991 to 26% in 1994, reflecting an increase of approximately 800,000 people with severe disabilities in the workforce.[7] Some argue, however, that there is little direct evidence showing that these increases are due to Title I measures.[8]

How may policymakers and researchers assess employer and societal attitudes and behavior toward the entry of these individuals into the workforce? How will Title I implementation help to prevent discrimination and prejudice against this sector of the workforce? And, how will this new generation of qualified people with disabilities continue to advocate for their rights in employment and in other areas?

II. Tracking an Emerging Workforce under ADA Title I

Since 1989, my colleagues and I have examined empirically the implementation of the employment provisions of the ADA, as set forth in Title I of the act. One of our studies follows the lives of some 5,000 adults and children with mental and physical disabilities (primarily mental retardation) and collects information on an array of individual, economic, health, and attitudinal measures.[9] This paper highlights information collected for the period 1990 to 1995, reflecting changes in the participants' social and economic positions as indicators of progress. The findings presented, however, are descriptive and exploratory, documenting and charting trends prior to and after Title I's implementation.

The investigation includes two general types of outcome measures: employment integration and economic opportunity. A descriptive model or framework for the study of these outcome measures appears in Figure 1. The research model uses several independent measures to identify trends in employment integration and economic opportunity. These predictor

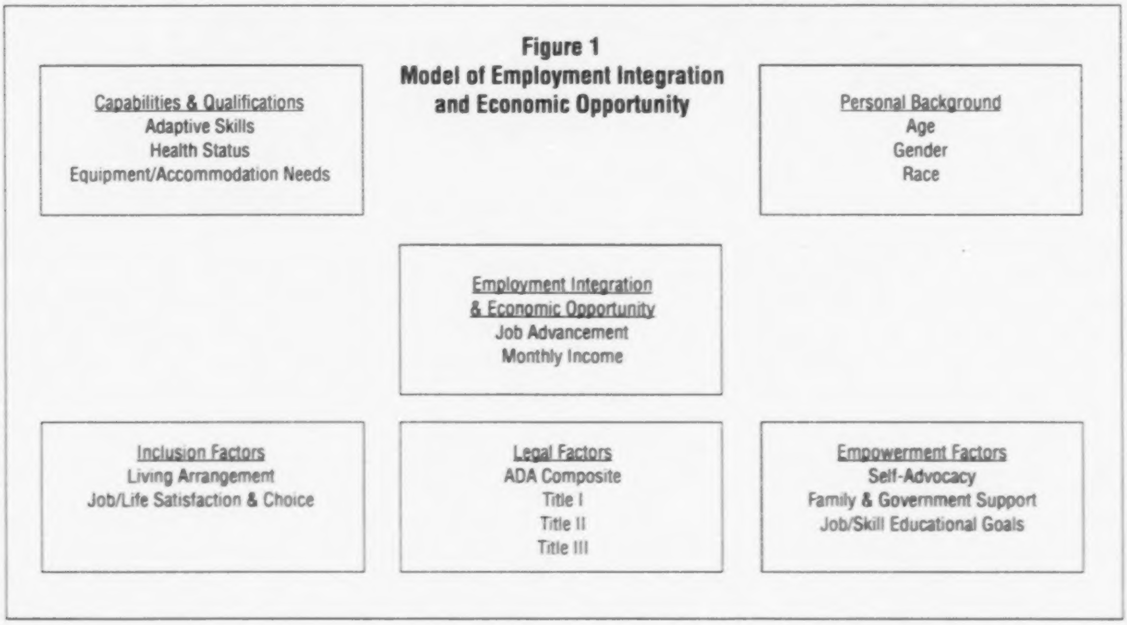

Figure 1
Model of Employment Integration and Economic Opportunity

Capabilities & Qualifications
Adaptive Skills
Health Status
Equipment/Accommodation Needs
Personal Background
Age
Gender
Race
Employment Integration & Economic Opportunity
Job Advancement
Monthly Income
Inclusion Factors
Living Arrangement
Job/Life Satisfaction & Choice
Legal Factors
ADA Composite
Title I
Title II
Title III
Empowerment Factors
Self-Advocacy
Family & Government Support
Job/Skill Educational Goals

variables include assessments of the participants' personal backgrounds, capabilities and qualifications, inclusion and empowerment in society, and perceptions of ADA implementation and rights.

The framework in Figure 1 helps identify many of the variables that need to be studied to understand the nature and impact of an individual's particular disability and its relation to employment opportunity and advancement. "Disability" is viewed as a function of a person's skills (*e.g.*, as highlighted in Figure 1 as "capabilities and qualifications") and their environment (*e.g.*, highlighted in Figure 1 as "inclusion factors" and "empowerment factors").

Questions derived from the research model requiring systematic study include the following:

1. What constitutes a substantial limitation on the major life activity of work (*e.g.*, quality of health status alone)?
2. How do substantial limitations on major life activities change over time for persons with different disabilities and with varying job skills?
3. In what ways do individual empowerment strategies (*e.g.*, involvement in self-advocacy) enhance rights and advancement in the workplace?
4. How do the living environments (*e.g.*, independent versus segregated settings) of individuals with disabilities support their ability to attain and retain work?, and
5. What emerging employment opportunities and barriers face persons with severe disabilities?

Long-term study is needed to address related questions such as the following:

1. How will the "shadow" of Title I law affect employers' ability to maintain a qualified workforce and economic competitiveness?
2. In what ways will Title I enhance employment opportunities and economic growth for qualified women and men, younger and older workers, workers from different ethnic groups, and workers with obvious and hidden disabilities?
3. How will structural labor market forces and an increasingly global economy affect employment integration and the rights of persons with disabilities, both in this country and abroad?[10]
4. How will the EEOC and the courts assess what constitutes minimal compliance with the law?, and
5. What are the perceptions and the realities of Title I's effectiveness, implementation, and compliance, based on the experiences of persons with various disabilities?

Further study in many areas besides those mentioned above is needed for a full understanding of employment integration under Title I. The following principles have guided the focus of our investigations:

1. The study of disability requires interdisciplinary analysis (*e.g.*, from the perspectives of medicine, law, economics, policy, psychology, etc.).
2. Although disability is a function of limitations in skills and/or capabilities, it must be studied within the context of the work and living environments of the person with a disability.
3. All disabilities co-exist with individual strengths and capabilities.
4. With appropriate supports, the functioning of qualified persons with disabilities improves,[11] and
5. Disability is a natural part of the human experience.[12]

Illustrative Findings

As mentioned above, in the investigation, a major outcome measure is defined as the participants' degree of employment integration in society, categorized by involvement in employment as competitive, supportive, sheltered, or no employment. Consistent with the trends reported by the U.S. Census Bureau, the findings of the investigation show that from 1990 to 1995, almost half of the participants (43%) moved into more integrated employment settings. The proportion of individuals engaged in competitive employment more than doubled from 6% in 1990 to 15% in 1995. The growth in the attainment of employment is dramatic for persons with high job-related skills (*i.e.*, arguably those most "qualified"), with gains in the attainment of employment doubling, from 12% in 1990 to 25% in 1995. Relative unemployment levels for all participants decrease from 39% in 1990, to 12% in 1995. For those participants with high job-related skills, unemployment levels drop from 20% in 1990 to 5% in 1995.

Other measures of labor market outcomes for persons with different disabilities are necessary, including measures of earning parity with persons without disabilities in similar jobs. The investigation examines earned income in 1995 and changes in gross income from 1990 to 1995 (*e.g.,* from employment and other sources, while controlling for inflation). During the 1990 to 1995 period, gross income rises for participants. From 1993 to 1995, those in integrated employment show higher levels of earned income. Individuals with higher earned incomes in 1995 score higher on the capabilities and qualifications measures, are more likely to live in community settings, report greater empowerment and satisfaction with their jobs and lives, and are more involved in self-advocacy.

Individuals with higher capabilities and qualifications, particularly those with better job skills and health status, are significantly more likely to attain integrated and competitive employment. In addition, qualified persons in integrated employment are more likely to reside in integrated community settings, supporting the view that independent living is central to inclusion into society for many persons with disabilities. Individuals in integrated employment report that they are more satisfied with their work and life activities. This finding is consistent with studies showing that positive employment outcomes result in increased self-esteem for persons with disabilities.

Attitudes and behavior about inclusion and empowerment in the workplace and society is measured in several ways (*e.g.,* by degree of independence in living, and reported attitudes about satisfaction in employment and daily living). From 1990 to 1995, the proportion of individuals in community living rises substantially (*e.g.,* from 2% in 1990 to 32% in 1995 living independently). Positive attitudes regarding satisfaction with work and daily life improve significantly during this period.

Several measures explore attitudes about individual empowerment and civil rights. One measure reflects the participants' involvement in self-advocacy programs designed to enhance skills and knowledge relating to civil rights. During the early years of Title I implementation, the proportion of participants involved in self-advocacy activities more than doubled, from 18% in 1990 to 39% in 1995. In addition, individuals involved in self-advocacy are more likely to attain competitive employment and have higher earned incomes.

In-depth examination of the development of attitudes and behavior concerning self-advocacy for the workforce of people with disabilities is needed. Self-advocacy helps people to advocate and make decisions for themselves so that they are more independent and knowledgeable about their rights and responsibilities in society. Growing self-perceptions of empowerment by persons with visible, hidden or perceived disabilities — and resultant disclosure of disability or advocacy behavior in employment — likely will lead to the increased use of the anti-discrimination provisions embodied in Title I.[13]

Other measures in the investigation explore general attitudes concerning access to and rights in employment (ADA Title I issues), education and public transportation (ADA Title II issues), and public accommodations (ADA Title III issues). From 1990 to 1995, attitude levels concerning these issues fluctuated. From 1990 to 1992, in the early years of implementation, perceptions of ADA effectiveness and of access to society increased. Starting in 1992, attitude levels about rights and access drop, and by 1995, reported levels are almost comparable to those reported in 1990.

The trends suggest that upon passage of the ADA, especially during the two year period from 1990 to 1992, attitudes were high for a new civil rights era for people with disabilities. In just five years, however, the reality of implementation may not have achieved the promise of full inclusion and empowerment in society. Although it is too early to make definitive conclusions about these trends, research must examine over time the relation of attitudes and behavior in society to equal employment opportunity for qualified persons. The research cannot yet inform policymakers, employers, the disability community, and others about many of the complex issues related to implementation. It also cannot address the potential for ADA backlash driven by attitudinal differences between the emerging generation of self-advocating individuals with disabilities and those who retain stereotypical thinking about people with disabilities.[14]

Indicative of the work ahead, however, is the fact that historically, millions of qualified individuals with disabilities have been segregated from competitive employment — confined to a "black hole" of non-integrated work settings — leading to a cycle of failure and frustration.[15]

In examining the relative percentage change in participants' employment status from 1990 to 1995, employment is categorized as non-integrated (*e.g.,* defined as no employment or employment in a sheltered workshop) or integrated (*e.g.,* defined as supported or competitive employment). The findings show that 81% of participants in non-integrated settings in 1990 remain in those settings in 1995 (*i.e.,* the "black hole effect"). The comparatively lower "survival rates" for participants in integrated employment amplify the problematic trend (*e.g.,* only 43% of those in integrated settings in 1990 remain in this category in 1995). In addition, more than half (57%) of the participants in integrated employment in 1990 regress to non-integrated settings by 1995, whereas only 19% of those in non-integrated employment in 1990 move to integrated employment by 1995. These findings are consistent with studies suggesting that persons with disabilities experience high levels of movement in and out of the competitive labor market. Empirical study is crucial for assessing the interaction of effective Title I implementation, welfare and health care policy reforms during the second Clinton term, and "black hole" unemployment trends for persons with disabilities.

III. Implications

This paper describes an investigation of employment integration under ADA Title I for a particular group of individuals with disabilities. One long-term goal is to refine the descriptive model in Figure 1 to include persons with varying disabilities, living in rural and urban settings, from different socio-economic backgrounds, of all ages, and participating in different types of employment.

In the United States, current estimates of unemployment levels for persons with disabilities range from 50-90%.[16] The lack of access to competitive employment is a primary reason for discrimination against qualified persons with disabilities. The implementation of Title I is a major policy step toward reducing chronic unemployment for millions of qualified persons with disabilities. In the long-term, Title I may afford qualified individuals with disabilities the opportunity to experience job stability and advancement without hitting a "glass ceiling."[17]

The findings show that those individuals attaining integrated employment demonstrate a high degree of job skill (*i.e.,* they are "qualified") and independence. Perhaps not surprisingly, the most qualified participants in competitive employment often are those most likely to report limits on access to work and daily life activities. In other words, despite being subjected to the continued reality of structural and attitudinal discrimination, these post-ADA pioneers may be even more likely to assert their Title I civil rights in the future.

Several findings regarding this sample of persons with disabilities are illustrative of issues related to Title I implementation and policy during the second Clinton term: the growth in the proportion of persons involved in self-advocacy programs; reported increases in work satisfaction; reported improvements in health status; and growth in the proportion of persons living independently in the community in their own homes. These trends illustrate progress with respect to various individual, economic, and social indicators related to the goals of the ADA, such as equal opportunity, access, and satisfaction with work and daily life.

At the same time, most of the participants not employed or employed in non-integrated settings in 1990 remain in these settings in 1995, regardless of their job skill levels. This "black hole" trend reflects the problems of chronic unemployment and underemployment facing many qualified persons with disabilities. Policies and enhanced strategies are needed to help millions of qualified persons with disabilities enter the workforce. In addition, job retention and advancement strategies are needed to help individuals with disabilities keep jobs and achieve their full potential. Senator Tom Harkin, a sponsor of the ADA, has said that a major challenge facing America in the next century is to reach the millions of qualified individuals with disabilities stuck in the "black hole" of unemployment.[18]

Although it is too early to make definitive conclusions about the trends found in the investigation, during the second Clinton term it will be crucial for policymakers and others to assess whether we as a society are keeping the promises reflected in the ADA.[19] Many economic and social benefits and challenges associated with the ADA remain to be discovered and documented. For example, adequate economic data concerning the effects of this law on the population of young, qualified persons with disabilities poised to join the workforce is not yet available. This investigation highlights an "emerging work force" of young persons with disabilities, reflecting a new generation of persons who have received mainstream educations and whose families have advocated for their rights.

On the other hand, empirical information is emerging on the long-term economic value of antidiscrimination practices by employers. In an ongoing study on the ADA Title I practices of Sears, Roebuck & Co. — a company with 300,000 employees, 20,000 of whom are considered persons with disabilities — my colleagues and I have found that the average direct cost of providing reasonable accommodations to qualified workers with disabilities was $121 per worker from 1978 to 1992, and only $45 from 1992 to 1996.[20] Thus, the bottom-line benefit to Sears of employing qualified workers with disabilities has far exceeded the costs.

In addition, detailed information is becoming available on the costs and benefits of accommodating persons with mental rather than physical disabilities.[21] Such empirical information provides feedback to employers and potential employees about effective ADA implementation strategies in different business sectors, thereby further reducing costly litigation on the subject. Research is lacking, however, on strategies to assist qualified persons with obvious, hidden and perceived disabilities entering the workforce. Analysis of job retention, assessment, advancement, disclosure, and accommodation strategies are needed to help qualified individuals keep jobs and achieve their potential. Study is needed to address the economic and social factors (*e.g.*, the impact of health insurance reform) and structural changes in the labor market that influence employment opportunity for persons with different disabilities. Such study could include factors such as types of jobs attained (*e.g.*, entry-level, service-related, or production), geographic differences in job markets and hiring patterns, turnover, productivity, retention, wage, and promotion rates, availability of transportation to work, and the direct and indirect costs and benefits of workplace accommodations.

Conclusion

Many believe that ADA Title I has reflected a dramatic shift in American attitudes and behavior toward the equal employment of qualified persons with disabilities. Yet, five years after the law's effective date, questions remain about the effective implementation of the law. This is due in part to a lack of systemic study. The debate over implementation has been fueled by suggestions, in the absence of data, that Title I is not cost effective and has distorted the market value of American labor, requiring employers to take "affirmative" and unduly costly measures to accommodate qualified persons with disabilities. These conclusions are not supported by the emerging findings that the costs of accommodating qualified workers is low and the relative economic benefits high, while the costs of not accommodating and not retaining qualified workers is relatively high. Independent of economic "cost/benefit" or other empirical study associated with Title I implementation, however, future definition by the Clinton Administration of the policies toward the employment of qualified persons with disabilities is needed. Dialogue and study are needed also to raise awareness and to understand the complex attitudes and behavior underlying Title I implementation.

Endnotes

[1] Portions of this paper have appeared in P.D. Blanck, "Assessing Five Years of Employment Integration and Economic Opportunity under the Americans with Disabilities Act," 19 *Mental & Physical Disability Law Reporter* 384 (1995), and P.D. Blanck, M.W. Marti, "Attitudes, Behavior, and the Employment Provisions of the Americans with Disabilities Act," forthcoming, *Villanova Law Review* (1997).

[2] P.D. Blank, *Communications Technology for Everyone: Implications for the Classroom and Beyond* (White Paper and CD-ROM, The Annenberg Washington Program) (1994).

[3] "ADA Watch Year One: A Report to the President and the Congress on Progress," in National Council on Disability, *Implementing the Americans with Disabilities Act* 3 (1993).

[4] F.S. Hall & E.L. Hall, "The ADA: Going Beyond the Law," 8 *Acad. Mgmt. Exec. J.* 17 (1994).

[5] Health Insurance Reform Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

[6] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, *Pub. Law* 104-193 (1996).

[7] Six Years after Signing of Law, ADA has been cited in more than 1,000 Suits, *Disability Compliance Bulletin,* LRP Publications, Aug. 15, 1996 (data reflects a 27% increase of persons with severe disabilities in the workforce from 1991 to 1994).

[8] *See, e.g.,* W. Oi, "Employment and Benefits for People with Diverse Disabilities", in J. Mashaw, V. Reno, R. Burkhauser & M. Berkowitz (eds.), *Disability, Work and Cash Benefits* 103 (1996).

[9] P.D. Blanck, "The Emerging Work Force: Empirical Study of the Americans with Disabilities Act," 16 *J. Corp. L.* 693 (1991); P.D. Blanck, "Employment Integration, Economic Opportunity, and the Americans with Disabilities Act: Empirical Study from 1990 to 1993," 79(4) *Iowa Law Review* 853-939 (1994).

[10] P.D. Blanck, "Studying Comparative Anti-Discrimination Law: Employment Integration and Economic Opportunity under the ADA from 1990-1994," paper presented at Yale Law School Conference entitled "Should Difference Make a Difference?" (March 1995).

[11] *See* American Association on Mental Retardation, Mental Retardation "Definition, Classification, and Systems of Support" 1 (1992).

[12] T. Harkin, "The Americans with Disabilities Act: Four Years Later (Commentary on Blanck)," 79(4) *Iowa Law Review* 935, 936 (1994).

[13] A.B. Miller & C.B. Keys, Awareness, Action, and Collaboration: How the Self-advocacy Movement is Empowering for Persons with Developmental Disabilities, 34(5) *Men. Retardation,* 312-19 (1996) (analysis of self-advocacy as weapon against discrimination).

[14] J.P. Shapiro, *No Pity: People With Disabilities Forging a Civil Rights Movement* 70-73, 328 (1994) (discussing backlash against disability rights movement).

[15] *Id.* at 4.

[16] *See* P. Wehman, "Employment Opportunities and Career Development," in P. Wehman (ed.) *The ADA Mandate for Social Change* 145, 154 (1993).

[17] *See* P. Wehman *et al.* (eds.), *Supported Employment: Strategies for Integration of Workers with Disabilities* 54-58 (1992).

[18] Harkin *supra* note 12 at 936.

[19] Wehman *supra* note 16 at 255.

[20] P.D. Blanck, "Communicating the Americans with Disabilities Act, Transcending Compliance: 1996 follow-up report on Sears, Roebuck & Co.," *Annenberg Washington Program Reports* (1996).

[21] P.D. Blanck *et al.,* "Implementing Reasonable Accommodations Using ADR Under the ADA: A Case of a White Collar Employee with Bipolar Mental Illness," 18 *Mental & Physical Disability Law Reporter* 458 (1994).

Chapter XIV

Federal Action to Confront Hate Violence: A Mixed Record of Achievement and Missed Opportunities

by Michael Lieberman[1]

Introduction

All Americans have a stake in effective response to violent bigotry. These crimes demand a priority response because of their special impact on the victim and the victim's community. Failure to address this unique type of crime could cause an isolated incident to explode into widespread community tension. The damage done by hate crimes cannot be measured solely in terms of physical injury or dollars and cents. Hate crimes may effectively intimidate other members of the victim's community, leaving them feeling isolated, vulnerable, and unprotected by the law. By making members of minority communities fearful, angry, and suspicious of other groups — and of the power structure that is supposed to protect them — these incidents can damage the fabric of our society and fragment communities.

I. The Clinton Administration

President Clinton has demonstrated a great appreciation for the importance of intergroup understanding and cooperation. He clearly recognizes the potential influence of his own leadership — and of the utility of his "bully pulpit" — in taking a stand against intolerance and bigotry. In criticizing incivility and hate speech on the radio, in promoting improved intergroup relations, in his memorable 1993 Memphis speech on crime and the importance of family, in rolling up his own sleeves and taking up tools to help rebuild a church burned by arsonists, President Clinton has demonstrated that he is capable of leading the charge against bigotry and intolerance — articulating the highest aspirations of intergroup harmony and improved race relations.

In the past two years, the government's ability to respond to hate violence and community conflict has been sorely tested by the disturbing series of suspicious fires at houses of worship — many at predominately black churches in the South. Though slow to recognize the national scope of this problem, in recent months federal officials have responded quite well to these attacks, waging a multifaceted, well-coordinated interagency campaign focusing on public education, prevention, enforcement, and rebuilding.

Beyond responding to the fires, however, the Clinton Administration has fallen short of expectations and potential in developing and implementing preventative and proactive programs to address bigotry and hate violence. While it is true that there are now a significant number of initiatives underway in various federal agencies to address prejudice and bias-motivated violence, most of the programs now being implemented were mandated by Congress before President Clinton was elected. With the important exception of the well-conceived, vigorous federal campaign to address arsons against houses of worship, there has been very little coordination among government agencies in responding to other incidents of hate violence and little enthusiasm to develop anti-prejudice programs. Outside civil rights groups have been frustrated by the fact that there has been no designated point person on the White House staff for intergroup relations and bias crime issues.

II. The 104th Congress

The 104th Congress, too, deserves credit for its decisive, bipartisan response to the church arsons. However, prominent among other legislation considered over the past two years were a number of highly divisive initiatives designed to differentiate between the rights and benefits of one group of Americans and another — and between citizens and non-citizens. Among these measures were: legislation to drastically limit overall immigration; House passage of legislation to make English the "official language" of the United States; enactment of a measure to allow states to disregard same-sex marriages in other states and to deny federal benefits associated with these marriages; House passage of legislation to prevent the children of undocumented immigrants from attending public schools; Senate rejection of a measure to afford gays and lesbians protection from workplace discrimination; and enactment of a broad welfare reform law that will significantly restrict new immigrants' access to federal health and welfare benefits. Millions of Americans, distinguished by a native language other than English, their parents' place of birth, or their sexual orientation, were reminded again in debate over these initiatives that some in Congress consider them second-class citizens, not deserving of equal treatment.

Moreover, against the backdrop of existing, longstanding discrimination against these groups, the sometimes overheated debate over these national policy decisions (as well as similar issues considered as state ballot initiatives) can feed stereotypes and misunderstandings and contribute to a climate of suspicion and mistrust — leading to an "us versus them" mentality. Restrictions on the use of a language other than English, for example, clearly suggest the inferiority of other languages — and language has long been recognized as closely connected to national origin and ethnicity.[2] Reports prepared by the National Asian Pacific American Legal Consortium[3] and the National Council of La Raza, have cited anti-immigrant sentiment as a contributing factor in hate violence directed at individuals on the basis of their national origin or ethnicity. Gay and lesbian organizations have documented an increase in hostility and violence directed at their communities during consideration of state anti-gay and lesbian referenda.[4]

III. Federal Action

The Hate Crime Statistics Act (HCSA)[5]

Though a number of private groups[6] and state law enforcement agencies track incidents of hate violence, the HCSA now provides the best national picture of the magnitude of the hate violence problem in America — though still clearly incomplete. Enacted in 1990, the HCSA requires the Justice Department to acquire data on crimes which "manifest prejudice based on race, religion, sexual orientation, or ethnicity" from law enforcement agencies across the country and to publish an annual summary of the findings. In the Violent Crime Control and Law Enforcement Act of 1994[7], Congress expanded coverage of the HCSA to require FBI reporting on crimes based on "disability."

Police officials have come to appreciate the law enforcement and community benefits of tracking hate crime and responding to it in a priority fashion. By compiling statistics and charting the geographic distribution of these crimes, police officials may be in a position to discern patterns and anticipate an increase in racial tensions in a given jurisdiction. Law enforcement officials can advance police–community relations by demonstrating a commitment to be both tough on hate crime perpetrators and sensitive to the special needs of hate crime victims.[8]

However, studies by the National Organization of Black Law Enforcement Executives (NOBLE) and others have revealed that some of the most likely targets of hate violence are the least likely to report these crimes to the police.[9] In addition to cultural and language barriers, some immigrant victims fear reprisals or deportation if incidents are reported. Many new Americans come from countries in which residents would never call the police — *especially* if they were in trouble.[10] Gay and lesbian victims, facing hostility, discrimination, and, possibly family pressures because of their sexual orientation, may also be reluctant to come forward to report these crimes.[11] These issues present a critical challenge for improving law enforcement response to hate violence. When police departments implement the HCSA in partnership with community-based groups, the effort should enhance police-community relations.[12]

Five Years of HCSA Data: Progress and Significant Promise

The FBI documented a total of 4,558 hate crimes in 1991, reported from almost 2,800 police departments in 32 states.[13] The Bureau's 1992 data, released in March 1994, documented 7,442 hate crime incidents reported from more than twice as many agencies (6,181), representing 42 states and the District of Columbia.[14] For 1993, the FBI reported 7,587 hate crimes from 6,865 agencies in 47 states and the District of Columbia.[15] The FBI's 1994 statistics documented 5,932 hate crimes, reported by 7,356 law enforcement agencies across the country.[16]

The FBI's 1995 HCSA Data at a Glance

The FBI's 1995 HCSA report documented 7,947 crimes reported by 9,584 agencies across the country.[17] While we will know much more about the validity of the FBI's 1995 data when the Bureau releases its annual jurisdiction-by-jurisdiction breakdown in the next few months, the summary data released in November provides useful information. Here are highlights:

- The FBI report indicated that about 61% of the reported hate crimes were race-based, with 16% committed against individuals on the basis of their religion, 10% on the basis of ethnicity, and 13% against gay men and lesbians.
- The 1,058 crimes against Jews and Jewish institutions comprised more than 13% of the total — and 83% of the reported hate crimes based on religion. Approximately 38% of the reported crimes were anti-black, 15% of the crimes were anti-white, 4.5% of the crimes were anti-Asian, and 6.5% anti-Hispanic.

The 1995 HCSA data continued a welcome trend of a growing number of agencies participating in the HCSA data collection efforts.[18] However, only 60% of the 16,000 law enforcement agencies that regularly report crime data to the FBI are reporting hate crime data to the Bureau. Moreover, as in years past, the vast majority of participating agencies affirmatively reported that *no hate crimes were committed in their jurisdictions.* Of the 9,584 departments participating in the 1995 HCSA data collection effort, only 1,560 (16%) reported even one hate crime.

Despite an incomplete reporting record over the first five years of the Act, the HCSA has proven to be a powerful mechanism to confront violent bigotry against individuals on the basis of their race, religion, sexual orientation, or ethnicity — and a spark for increased public awareness of the problem.[19] Studies have demonstrated that victims are more likely to report a hate crime if they know a special reporting system is in place.[20]

Legislation to Provide a Permanent Mandate for the HCSA

In 1990, when some doubted the feasibility and utility of the HCSA data collection program, Congress mandated the data collection initiative only through 1994. Under the leadership of Sens. Paul Simon (D-IL) and Orrin Hatch (R-UT), the original sponsors of the HCSA, legislation was introduced in the 104th Congress to provide for a permanent mandate for the Act. This measure, S. 1624, was the subject of hearings before the Senate Judiciary Committee on March 19, 1996 and attracted impressive bipartisan support.[21] Recognizing that data collection efforts complement criminal prosecutions of hate crime offenders, Congress included a continuing mandate for the HCSA and authorized "such sums as may be necessary to carry out the provisions of this section..." through 2002 as part of the Church Arson Prevention Act (CAPA),[22] signed into law in July.[23]

Bigotry Burning: Arsons at Houses of Worship

The disturbing series of attacks against houses of worship have had a searing impact on the nation and served as another graphic reminder that America's long struggle against racial and religious intolerance is far from over. Although law enforcement investigators and private watchdog groups, like ADL, have seen no indication that these attacks are part of a national conspiracy of domestic terrorism directed by organized hate groups, we should not be comforted by this fact. If it is not a conspiracy, it only means that individuals, in different parts of the country, at different times, often inspired by hate, are acting independently to commit these crimes.

According to Justice Department officials, from January 1, 1995 to November 27, 1996, DOJ has opened 306 investigations of suspicious fires, bombings, and attempted bombings; made arrests in 90 of these incidents, with 27 convictions to date. In 1996, 261 of these investigations were opened, and 128 of the 306 attacks have been directed against houses of worship that are predominately African American institutions. One-hundred and twenty-three persons have been arrested for these crimes, including 23 African Americans; 52 of the alleged perpetrators have been juveniles.

These fires and bombings resonate so meaningfully because there is a historical context for these attacks. They remind us of Night Riders, cross burnings, and Ku Klux Klan terror that was centered on black churches. An attack on a house of worship is much more than destruction of wood, brick, and mortar because these structures provide a bridge between a religious community and its God. Churches, synagogues, and mosques are places of refuge, sanctified spaces that serve as safe havens from the troubles of the outside world. In addition, throughout American history, churches and synagogues have provided a focal point for many major cultural and social movements. This is especially true in the African American community; churches served as stops along the Underground Railroad, voting registration posts during Reconstruction, and political headquarters during the Civil Rights Movement of the 1960s. Many of the churches that have been burnt are small and rural — the core of a community's social, political, and economic life. Many of these churches offered educational facilities, day care centers, and voter registration and voting poll sites.

To compound the pain and frustration of these fires, many Pastors and congregants have complained of perceived insensitive treatment by law enforcement officials conducting the arson investigations. While these officials are charged with examining every possible evidentiary lead, investigations of arsons at houses of worship must be conducted in a different manner than an arson at a factory. The tensions and suspicions were compounded when it was discovered that as many as a dozen of the BATF investigators had been in attendance at the annual "Good Ole Boys Roundup" where racist acts took place.[24]

The Federal Response to Arsons at Houses of Worship

The federal government's response to the fires and vandalism has been unusually well-coordinated and bipartisan in nature. President Clinton, Vice President Gore, and Assistant Attorney General for Civil Rights Deval Patrick have repeatedly and forcefully spoken out against these heinous acts, setting a tone of national outrage.[25] Importantly, each has rolled up his sleeves in church rebuilding efforts. Federal agencies have responded with unusually integrated and coordinated action focused on prevention, enforcement, and rebuilding:

- The Federal Emergency Management Agency (FEMA) has worked to develop arson prevention materials and has provided arson training grants to affected states. BATF prepared a Church Threat Assessment Guide to help houses of worship, especially rural ones, take steps to protect themselves from criminal arsonists and vandals.
- In testimony before the Senate Judiciary Committee, Justice and Treasury Department officials labeled the response to the attacks "one of the largest federal criminal investigations of any kind, one of the largest arson investigations in history, and the largest current civil rights investigation."[26] The Justice Department's Community Relations Service has worked aggressively to address community tensions in the aftermath of these attacks.[27]
- The Department of Housing and Urban Development is administering a $10 million Federal Loan Guarantee Fund and has provided other technical rebuilding assistance.

- The Department of Education is funding several new prejudice reduction initiatives.

This interagency response has been complemented by extraordinary outreach and cooperative efforts by private civil rights and religious organizations — ranging from financial and legal assistance to providing volunteers to help rebuild.[28] In fact, the relationships established and the cooperative efforts undertaken on this issue have had a very positive effect on intergroup relations nationally.

The Church Arson Prevent Act (CAPA)

This measure, sponsored by Sens. Lauch Faircloth (R-NC) and Edward Kennedy (D-MA), and, in the House, by Reps. Henry Hyde (R-IL) and John Conyers (D-MI), was originally designed solely to facilitate federal investigations and prosecutions of these crimes by amending 18 U.S.C. Section 247, a statute enacted by Congress in 1988 to provide federal jurisdiction for religious vandalism cases in which the destruction exceeds $10,000. Hearings were held on both the impact of these crimes and the appropriate response of government.[29] Federal prosecutors testified that the statute's restrictive interstate commerce requirement and its relatively significant damages threshold had been obstacles to federal prosecutions.

Following the hearings, Congress found that "[t]he incidence of arson of places of religious worship has recently increased, especially in the context of places of religious worship that serve predominately African-American congregations."[30] Legislators appropriately recognized that the nation's response to the rash of arsons should be more ambitious and comprehensive than mere efforts to ensure swift and sure punishment for the perpetrators.

In a welcome, if very rare, example of bipartisanship, both the House and the Senate unanimously approved legislation which broadened existing federal criminal jurisdiction and facilitated criminal prosecutions for attacks against houses of worship, increased penalties for these crimes, provided a continuing mandate for the HCSA, established a loan guarantee recovery fund for rebuilding, and authorized additional personnel for BATF, the FBI, Justice Department prosecutors, and the Justice Department's Community Relations Service to "investigate, prevent, and respond" to these incidents.

Bigotry in the Armed Forces: Incompatible with Military Service

The murder of two black individuals in Fayetteville, North Carolina in December 1995, allegedly by two white soldiers stationed at nearby Fort Bragg who were involved in neo-Nazi skinhead activities, highlights the danger posed by even small numbers of extremists in the military. In the wake of these murders, the Army established a Task Force on Extremist Activities, which conducted extensive interviews and surveys of thousands of soldiers and released its report in March 1996.

The report found minimal evidence of extremist activity in the Army, yet, even if organized hate group members in the military are few in number (as they are in general society), the access they have to weapons, explosives, and training make them a potentially significant threat to society. In addition, the presence of haters and extremists in the military poses a threat to morale and good order in the ranks.

The response of the Armed Forces to hate group organizing in the military was the subject of useful hearings before the House National Security Committee on June 25, 1996. Representatives from the Pentagon and the three service branches all appeared to describe steps they are taking to address this issue. In an important follow up, Congress included a requirement in the FY 1997 Defense Department Authorization bill that each service branch conduct "ongoing programs for human relations training for all members of the Armed Forces" and required DoD to conduct an annual survey to measure the state of racial, ethnic, and gender discrimination — as well as the extent of hate group activity — and to prepare a report to Congress.[31]

Other Hate Crime-Related Legislative Initiatives in the 104th Congress

1) H.R. 3781: Hate on the Internet. On July 9, 1996, Rep. Dick Zimmer (R-NJ) introduced a measure which would require the Commerce Department's

National Telecommunications and Information Administration (NTIA) to study hate on the Internet — analyzing its use for the dissemination of propaganda, evaluating the extent to which this propaganda is accessible to minors, and making appropriate recommendations.[32] NTIA has prepared a useful 1993 report on broadcast hate.[33] The bill was pending before the Commerce Committee when Congress adjourned.

2) H.R. 3825: Hate Crime Coordination and Training. Then-Rep. (now Senator) Robert Torricelli (D-NJ) introduced this measure, which provides for the appointment of a "National Director of Bias Crime" in the Justice Department to coordinate the federal government's hate crime prevention, training, and education initiatives. The bill also authorized $2 million a year from 1997 to 1999 for these purposes. The bill was pending before the Judiciary Committee when Congress adjourned.

3) Expanding the Justice Department's Criminal Civil Rights Jurisdiction. Under the leadership of Sen. Kennedy, legislation is being drafted which would expand current federal criminal civil rights jurisdiction in 18 U.S.C. Section 245 to eliminate unnecessary obstacles to federal prosecutions. The statute currently prohibits intentional interference, by force or threat of force, with enjoyment of a federal right or benefit (like voting) on the basis of the victim's race, color, religion, or national origin. Many civil rights groups have indicated support for efforts to eliminate the overly restrictive jurisdictional requirement that victims of hate crimes be engaged in a federally protected activity at the time of the crime[34] and to broaden the protected classes to include individuals victimized on the basis of their sexual orientation[35] or gender.[36]

Hate Crime Statutes: A Message to Victims and Perpetrators

Every state should enact a penalty-enhancement hate crime statute. While bigotry cannot be outlawed, hate crime statutes demonstrate an important commitment to confront criminal activity motivated by prejudice. In conjunction with comprehensive implementation of the HCSA, stiff penalties for hate crime perpetrators send the clear message that hate violence is a law enforcement priority and that each hate crime — and each hate crime victim — is important.

At present, 47 states and the District of Columbia have enacted some type of statute addressing hate violence.[37] Congress enacted a federal complement to state hate crime penalty-enhancement statutes in the 1994 crime bill. This provision, the Hate Crimes Sentencing Enhancement Act, requires the United States Sentencing Commission to increase the penalties for crimes in which the victim was selected "because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."

The U.S. Supreme Court's unanimous decision in *Wisconsin v. Mitchell*[38], on June 11, 1993, upholding the constitutionality of the Wisconsin hate crime penalty-enhancement statute — based on an ADL model now law in more than 30 states — removed any doubt that state legislatures may properly increase the penalties for criminal activity in which the victim is intentionally targeted because of his/her race, religion, sexual orientation, gender, or ethnicity.

The intent of penalty-enhancement hate crime laws is not only to reassure targeted groups by imposing serious punishment on hate crime perpetrators, but also to deter these crimes by demonstrating that they will be dealt with in a serious manner. Under these laws, no one is punished merely for bigoted thoughts, ideology, or speech. But when prejudice prompts an individual to *act* on these beliefs and engage in criminal conduct, a prosecutor may seek a more severe sentence, but must prove, beyond reasonable doubt, that the victim was intentionally selected because of his/her personal characteristics.

IV. Federal Hate Crime Awareness and Training Initiatives: A Status Report

Justice Department Programs and Initiatives

1) The Federal Bureau of Investigation/Hate Crime Statistics Act. The FBI has been receptive to requests for HCSA training for state and local law enforcement officials. As of September 1996, the FBI had held 76 hate crime training conferences across the country, training nearly 4,400 law enforcement personnel from 1,200 agencies. The Bureau updated both its Hate Crime Data Collection Guidelines and its excellent Training Guide for Hate Crime Data Collection in 1996. ADL and other groups with expertise in analyzing and responding to hate violence have participated in a number of these training seminars for state and local law enforcement authorities on how to identify, report, and respond to hate crimes.

2) The Community Relations Service (CRS). CRS is the only federal agency that exists primarily to assist communities in addressing intergroup disputes. On many occasions since the establishment of CRS in the 1964 Civil Rights Act, CRS professionals, working with police officials and civil rights organizations, have acted to defuse community tensions and prevent disorders that could have escalated into riots. For example, CRS professionals have frequently provided technical assistance to law enforcement officials and community groups facing the impact of a Klan rally or a demonstration by organized hate groups. CRS has played a leading role in the implementation of the HCSA, the Justice Department's hate crime data collection mandate. CRS professionals have participated in HCSA training sessions for hundreds of law enforcement officials from dozens of police agencies across the country.

Neither Congress nor the White House have demonstrated an appreciation for the unique violence prevention role of CRS. Budget-minded Members of Congress voted to cut funding for CRS mediation and conciliation services from $10.6 million in 1995 to $5.3 million in 1996, forcing the agency to make substantial staff reductions. The White House did not select its nominee for CRS Director, Rose Ochi, until August 1996. The Senate Judiciary Committee held a confirmation hearing for Ms. Ochi in September, but took no action on her nomination before Congress adjourned. CRS staff reductions have seriously compromised the agency's core mission and have limited the Service's ability to project the civil rights sensibilities of the Justice Department in the field. Nevertheless, CRS received deserved recognition as part of the government's national arson prevention team, as well as an explicit authorization for additional personnel in the Church Arson Prevention Act.

3) The Office For Victims of Crime (OVC). In 1992, at the direction of Congress,[39] the Justice Department's Office for Victims of Crime (OVC) provided a $150,000 grant for the development of a training curriculum to improve the response of law enforcement and victim assistance professionals to victims of hate crimes.[40] This excellent OVC training curriculum also promotes coordinated action between law enforcement officials and victim assistance professionals in the investigation and prosecution of these crimes.

4) The Office of Juvenile Justice Delinquency Prevention (OJJDP). In 1992, under the leadership of Sen. Herb Kohl (D-WI) and Rep. Nita Lowey (D-NY), Congress approved several new hate crime and prejudice-reduction initiatives as part of the four-year Juvenile Justice and Delinquency Prevention Act reauthorization.[41] The Act included a requirement that each state's juvenile delinquency prevention plan include a component designed to combat hate crimes and a requirement that the Justice Department's Office of Juvenile Justice Delinquency Program (OJJDP) conduct a national assessment of youths who commit hate crimes, their motives, their victims, and the penalties received for the crimes.

In response, in 1993, OJJDP allocated $100,000 for this national assessment — a Hate Crime Study to identify the characteristics of juveniles who commit hate crime, the types of hate crimes committed by juveniles, and a profile of victims of juvenile hate crimes. After a baffling extended delay, OJJDP submitted an incomplete and disappointing report in July 1996[42] that failed to provide any insights into the magnitude of the problem, the characteristics of the offenders or victims, the causes of juvenile hate violence, or recommendations for future study or future action.

In addition, OJJDP also provided an initial $50,000 grant for the development of a wide-ranging curriculum — appropriate for educational, institutional, and other settings — to address prevention and treatment of hate crimes committed by juveniles.[43]

5) The Bureau of Justice Statistics (BJS). At the March 19, 1996 hearings on the implementation of the HCSA, Charles W. Archer, Assistant Director of the FBI's Criminal Justice Information Services Division, testified that the FBI "plans to join with the Center for Criminal Justice Policy Research at Northeastern University in Boston in conducting research aimed at identifying the root causes of the differences in reporting among law enforcement agencies. BJS is currently examining funding research on strategies for increasing and sustaining reporting participation by state and local law enforcement officials.

6) The Bureau of Justice Assistance (BJA). Under a grant provided by BJA, the National Criminal Justice Association is currently preparing a comprehensive report on federal, state, and local response to hate crimes, including a review of relevant legal cases and law enforcement hate crime practices. This report is expected to be released in early 1997.

7) National Institute of Justice (NIJ). Under a 1995 grant provided by NIJ, the American Prosecutors Research Institute of the National District Attorneys Association is currently conducting a "best practices" review of prosecutor protocols in handling bias-motivated cases.

8) The Office of Violence Against Women. The Office oversees the implementation of the Violence Against Women Act (VAWA), enacted as Title IV of the 1994 omnibus crime bill, which declares that "All persons within the United States shall have the right to be free from crimes of violence motivated by gender."[44] The law provides authority for domestic violence and rape crisis centers and for education and training programs for law enforcement and prosecutors. Importantly, VAWA provides for victims of gender-based crimes to bring a civil suit, in either federal or state court, for money damages or injunctive relief. According to the NOW Legal Defense and Education Fund — the organization that coordinated the broad, bipartisan support for VAWA — for many victims of gender-based crimes, VAWA may be their only avenue for redress.[45]

9) The Office of Community Oriented Policing Services (COPS). Hate violence can be addressed effectively through a combination of presence, prevention, and outreach to the community that is the hallmark of community policing. Yet, to date, the COPS office has not funded a single specific hate violence initiative. The Administration's "National Arson Prevention Initiative" included COPS' existing Problem-Solving Partnership $40 million grant program, stating that "[s]pecial consideration will be given to organizations that seek to use these funds to address problems visited upon their communities by the arson of a religious property." No announcement has yet been made on whether any of these grants will go to fund hate violence or church arson prevention programs.

The Department of Education

There is growing awareness of the need to complement tough laws and more vigorous enforcement — which can deter and redress violence motivated by bigotry — with education and training initiatives designed to reduce prejudice.[46] The federal government has a central role to play in funding program development in this area and promoting awareness of initiatives that work.

In 1992, for the first time, Congress acted to incorporate anti-prejudice initiatives into The Elementary and Secondary Education Act (ESEA), the principal federal funding mechanism for the public schools.[47] Title IV of the Act, Safe and Drug-Free Schools and Communities, also included a specific hate crimes prevention initiative — promoting curriculum development and "professional training and development for teachers and administrators on the cause, effects, and resolutions of hate crimes or hate-based conflicts." These new federal initiatives represent a significant step forward in efforts to institutionalize prejudice reduction as a component of violence prevention programming.

In a significant step toward fulfillment of the promise of this measure, in July 1996, the Department of Education announced the availability of up to $2 million in new grants to fund the development and implementation of "innovative, effective strategies for preventing and reducing the incidence of crimes and conflicts motivated by hate in localities directly affected by hate crimes."[illegible]

The U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights has historically held useful field hearings and briefings on race relations. The Commission held community forums on the suspicious fires at houses of worship in six Southern states in July 1996.[illegible] Hosted by its State Advisory Committees, the Commission heard testimony from community and civic leaders, and federal, state, and local law enforcement officials.

The Department of the Treasury

Hate crime response experts from around the country — including ADL representatives — have assisted in the development of an excellent model hate crime training curriculum for use by the Federal Law Enforcement Training Centers (FLETC) for federal, state, and local police officials. The FLETC curriculum has been presented at eight training seminars across the country to more than 250 law enforcement training personnel — and deserves much more attention and promotion.

The Department of Housing and Urban Development (HUD)

In conjunction with the National Council of Churches and the Congress of National Black Churches, HUD has organized a series of information seminars at which HUD officials discuss its $10 million loan guarantee rebuilding fund, with architects, lawyers, and construction specialists available to offer specific assistance. In addition, representatives from the Justice Department, BATF, and FEMA have also been on hand to discuss enforcement and arson prevention activities. More than 100 houses of worship will receive rebuilding assistance through HUD's National Rebuilding Initiative.

The Federal Emergency Management Agency (FEMA)

FEMA has released almost $800,000 in funds to states to promote arson prevention training. In addition, FEMA has added a special section to its World Wide Web site in support of the National Arson Prevention Initiative.

V. A Hate Violence Deterrence and Response Action Agenda for the 105th Congress and the Clinton Administration in its Second Term

1) Response to Arsons and Attacks Against Houses of Worship.

- *Congress and the Administration should continue to focus public attention on arsons at houses of worship and demonstrate support for the victims of these arsons.* Hate crimes are designed to make the victims feel vulnerable and alone. Action must be taken to ensure that it is the bigots and the hatemongers that are isolated.
- *Congress and the Administration should increase funding for the Justice Department's Community Relations Service (CRS) and examine whether additional funding is necessary to expand FBI civil rights investigations and BATF arson investigations in these cases.* It is imperative that the federal government have the resources to conduct aggressive investigations and respond in the field to these violent acts of racial and religious intolerance. Especially in the context of allegations of insensitive questioning by arson investigators, the unique conciliation and mediation services CRS offers could provide an extremely useful link between affected communities and law enforcement officials investigating these crimes. Congress should appropriate the necessary funds to carry this mandate forward.

2) The Hate Crime Statistics Act and Hate Crime Training.

- *Congress should enact legislation to provide for a permanent mandate for the HCSA to underline the importance of the program and to ensure that hate crime data collection remains an integral* *part of the FBI Uniform Crime Reporting program.* The readiness of the criminal justice system to address hate violence has significantly improved over the five year history of the HCSA. Providing a permanent mandate for the Act will help institutionalize these changes and expand upon the improvements.

- *Congress and the Administration should provide funding for a broad-based analysis to discover why only a limited number of agencies have begun to report HCSA data, to determine successful strategies to increase hate crime reporting, and to identify tools the federal government possesses to encourage comprehensive participation in the national data collection initiative.*
- *The Administration and Congress should take steps to ensure that the FBI receives sufficient funding to continue to respond to requests for hate crime training from law enforcement agencies across the country, as well as funding to continue its own training and education outreach efforts for both new agents and in-service training for field agents at its own Quantico training academy.*
- *Congress and the Administration should promote comprehensive implementation of the HCSA by state and local enforcement officials.* Congress should provide additional incentives for HCSA implementation, including national recognition, matching grants for training, a network to promote replication of successful programs, and awards for exemplary departments.[58] As efforts to implement the HCSA continue and expand, we will learn more about the perpetrators of these especially hurtful crimes — and how to prevent them.
- *The Justice Department should make participation in the HCSA program a prerequisite for receiving money through either the Office of Community Oriented Policing Services (COPS) or its Office of Justice Programs (OJP).* Congress and the Administration should require that new officers hired under the COPS initiative receive training in how to identify, report, and respond to hate violence. Congress and the Administration should make the receipt of OJP technical assistance grants dependent on participation in the HCSA data collection effort.
- *The FBI should incorporate the annual HCSA report in its annual* Crime in the United States *(CIUS) report. CIUS,* essentially the Bible of crime statistics, is an impressive, almost 400-page compendium of jurisdiction-by-jurisdiction crime statistics, charts, graphs. *CIUS* is a primary resource for criminologists, analysts, and other scholars and policymakers, and analysts. With only five years of data and obviously incomplete reporting, the FBI has determined not to fully integrate HCSA into the many *CIUS* charts. Yet, while HCSA reporting levels advance toward the Bureau's high credibility standards, the Bureau should, at least, publish the HCSA data in a separate section of *CIUS.* Inclusion in *CIUS*, in whatever form, would encourage researchers and criminologists to study hate violence, place it on the agenda for criminal justice and crime prevention conferences, and send the signal to law enforcement officials that the HCSA is a permanent, integral part of the FBI's comprehensive data collection programs.
- At this time of heightened concern about illegal immigration and significant increases in INS resources and Border Patrol personnel, Congress and the Administration should evaluate existing training protocols and ensure that federal law enforcement officials are well trained to interact with persons of all different backgrounds and to identify, report, and respond to hate violence in an appropriate manner.
- *Congress and the Administration should ensure that the Treasury Department receives sufficient funding for its Federal Law Enforcement Training Center (FLETC) to promote its hate crime curriculum initiative and deliver this program to federal, state, and local law enforcement officials.*

3) The Justice Department's Community Relations Service (CRS).

- *Congress and the Administration should provide the Community Relations Service with sufficient funding to fulfill its unique violence prevention mandate.*

- *Congress should act to expand the mandate of CRS to include providing mediation and conciliation services on the basis of religion and sexual orientation.*[51] Limited by its authorizing statute (Title X of the Civil Rights Act of 1964) to respond only to conflicts based on race, color, and national origin, CRS has been unable to respond to well-documented evidence that a high incidence of hate-based crimes are committed against gays and lesbians and religiously identified people.[52]
- *The White House should press for confirmation of its designated CRS Director at an early point in the 105th Congress.*

4) Federal Civil Rights Statutes.

Federal law provides civil and criminal remedies for victims of racially and religiously motivated violence. While the number of federal prosecutions for racial violence is small — 38 prosecutions involving 65 defendants in 1996, and 43 prosecutions involving 66 defendants in 1995, these efforts supplement state and local criminal prosecutions and are especially significant in situations where local prosecutors have been unable (or unwilling) to act to effectively vindicate rights. A number of these racial violence cases involve prosecutions of members of the Ku Klux Klan and other organized hate groups. These cases — five in 1996, involving 12 defendants, and six in 1995, involving 10 defendants — play an important role in demonstrating the federal government's resolve to combat organized bigotry.[53]

- *Congress should act to amend 18 U.S.C. Section 245 to eliminate the federal protected activity requirement and permit prosecutions on the basis of sexual orientation and gender.*

5) Education.

The American Psychological Association (APA), in its landmark 1993 report[54], documented the role of prejudice and discrimination in fostering social conflict that can lead to violence. Educational resources are effective tools to alter attitudes and behaviors — which in turn can prevent and reduce acts of hatred and discrimination.[55]

- *Congress and the Administration should help promote civility and acceptance of differences in our society.* The nation must directly confront the prejudice and intolerance that can lead to hate crimes — in our communities, in our houses of worship, in our schools, and, especially, in our homes. The Justice Department, the Department of Education, and other involved federal agencies should institutionalize and coordinate their response to prejudice-motivated violence through programs and initiatives developed for schools and for youth violence prevention programs.
- *The federal government should promote democracy-building and citizenship initiatives — measures to support teaching about the Bill of Rights and the importance of cultural diversity and acceptance of cultural differences in the United States.*
- *Prejudice reduction initiatives should be institutionalized as an element of community and school anti-violence initiatives, and workshops and seminars on hate violence should be integral parts of school anti-violence conferences.*
- *The Department of Education should make information available regarding successful prejudice-reduction and hate crime prevention programs and resources. Resources must be allocated to institute and replicate programing on prejudice awareness, religious tolerance, conflict resolution, and multicultural education.*

6) Responding to Racism and Hate Crimes in the Armed Forces.

- The Department of Defense and all branches of the military should increase their efforts to collect information on extremist groups, provide anti-bias and prejudice awareness training for all recruits and military personnel, improve procedures for screening out racist recruits, and re-evaluate and clarify existing prohibitions against active duty participation in hate group activity.
- All branches of the Armed Forces should adopt a "zero tolerance" policy for racism as an activity that is incompatible with military service. This policy must be included in enlistment advertising and outreach materials for new recruits.

- Congress and the Administration should support legislation to amend the Uniform Code of Military Justice, which governs military conduct, to provide enhanced penalties for bias-motivated violence committed by members of the Armed Forces.

7) Leadership from Political and Civic Leaders.

- Politicians and civic leaders should not engage in divisive appeals based on race, ethnicity, sexual orientation, or religion.

Conclusion

The attempt to eliminate prejudice requires that Americans develop respect for differences and begin to establish dialogue across ethnic, cultural, and religious boundaries. While bigotry cannot be outlawed, effective response by public officials and law enforcement authorities to hate violence can make a difference in deterring and preventing these crimes.

The federal government has an essential leadership role to play in confronting criminal activity motivated by prejudice and promoting prejudice reduction initiatives for schools and the community. The bipartisan, comprehensive response of federal agencies and Congress to the attacks on houses of worship presents an important foundation on which to build in the 105th Congress and the second Clinton Administration.

Comparison of FBI Hate Crime Statistics 1991-1995

	1991	1992	1993	1994	1995
Participating Agencies	2.771	6.181	6.551	7.356	9.584
Total Hate Crime Incidents Reported	4.558	6.623	7.587	5.932	7.947
Number of States, including D.C.	32	42	47	44	46
Percentage of U.S. Population Agencies Represent	N/A	51	58	58	75

Offenders' Reported Motivations in Percentages of Offenses

	1991	1992	1993	1994	1995
Racial Bias	62.3	60.7	62.4	59.8	60.7
Anti-Black	35.5	34.7	37.1	36.6	37.6
Anti-White	18.7	20.3	19.4	17	15.4
Religious Bias	19.3	17.5	17.1	17.9	16.1
Anti-Semitic	16.7	15.4	15.1	15.1	13.3
Anti-Semitic as Percentage of Religious Bias	86.4	87.5	88.1	86.2	82.9
Ethnicity	9.5	10.1	9.2	10.8	10.2
Sexual Orientation	8.9	11.6	11.3	11.5	12.8

Race of Suspected Offenders as Percentage of Total Known Offenders

	1991	1992	1993	1994	1995
White	36.8	50.6	51	57	59.2
Black	16.9	40.6	33.6	29.7	26.7
Race Not Reported or Unknown	43.3	3.9	8.1	7.1	7.3

** Chart created by the Anti-Defamation League Washington Office from data collected by the U.S. Department of Justice Federal Bureau of Investigation.*

STATE BY STATE COMPARISON: HCSA REPORTING 1991-1995

A = Number of agencies participating in HCSA for each state
B = Number of incidents reported by agencies in the state
***= indicates "did not report"*

	1991		1992		1993		1994		1995	
STATE	**A**	**B**	**A**	**B**	**A**	**B**	**A**	**B**	**A**	**B**
Alabama	**	**	4	4	4	5	**	**	**	**
Alaska	**	**	**	**	1	24	1	9	1	8
Arizona	1	48	90	172	89	208	82	205	87	220
Arkansas	169	10	183	37	187	13	189	9	190	7
California	2	5	7	75	11	364	13	354	744	1751
Colorado	194	128	197	258	199	178	231	173	228	149
Connecticut	29	69	23	62	39	117	89	68	94	87
Delaware	58	29	57	47	49	33	51	42	51	45
District of Columbia	**	**	1	14	1	10	1	2	1	4
Florida	**	**	374	334	374	239	370	214	411	164
Georgia	2	23	4	66	4	75	3	51	3	49
Hawaii	**	**	**	**	**	**	**	**	**	**
Idaho	98	33	115	54	110	70	117	79	116	114
Illinois	26	133	620	241	224	724	19	239	1	146
Indiana	1	0	5	19	52	82	89	32	164	35
Iowa	201	89	190	36	196	39	226	61	232	29
Kansas	3	6	2	3	1	0	**	**	**	**
Kentucky	1	0	2	5	3	13	5	4	513	81
Louisiana	6	0	10	13	58	23	92	9	146	7
Maine	**	**	9	19	6	32	5	7	130	75
Maryland	156	431	156	484	153	404	150	325	148	353
Massachusetts	30	200	158	424	135	343	**	**	202	333
Michigan	**	**	454	122	555	247	518	252	480	405
Minnesota	42	225	69	411	66	377	**	**	66	285
Mississippi	4	1	1	0	17	0	53	6	51	6
Missouri	18	136	17	158	81	168	155	139	157	135
Montana	**	**	**	**	18	21	2	0	6	11
Nebraska	**	**	**	**	**	**	**	**	**	**
Nevada	1	16	3	23	9	12	5	16	35	68
New Hampshire	**	**	**	**	1	0	2	3	2	24
New Jersey	271	895	291	1114	317	1101	559	895	568	768
New Mexico	1	0	**	**	13	4	57	4	70	24
New York	773	943	569	1112	571	934	567	911	520	845
North Carolina	**	**	1	1	6	10	7	7	59	52
North Dakota	**	**	1	1	91	1	82	5	74	3
Ohio	30	80	26	105	128	260	266	357	321	267
Oklahoma	7	99	9	147	9	60	4	20	7	37
Oregon	39	296	279	376	279	237	206	177	243	152
Pennsylvania	50	277	944	432	1036	391	1044	278	1134	282
Rhode Island	**	**	44	48	45	62	45	37	45	46
South Carolina	**	**	4	4	295	27	302	30	293	26
South Dakota	**	**	**	**	3	4	4	1	38	5
Tennessee	2	1	2	4	56	2	113	20	104	25
Texas	28	95	870	486	879	418	895	364	914	326
Utah	**	**	9	12	121	45	123	93	116	107
Vermont	**	**	**	**	1	1	18	12	19	10
Virginia	19	53	24	102	21	100	160	95	175	51
Washington	206	196	207	374	207	457	226	281	229	266
West Virginia	**	**	**	**	**	**	**	**	**	**
Wisconsin	303	41	145	67	161	19	150	40	337	45
Wyoming	**	**	5	0	49	10	60	6	59	19

**Chart created by the Anti-Defamation League Washington Office from data collected by the U.S. Department of Justice Federal Bureau of Investigation*

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Endnotes

[1] Michael Lieberman has been the Washington Council for the Anti-Defamation League since January 1989. Since 1913, the mission of the Anti-Defamation League has been to "stop the defamation of the Jewish people and to secure justice and fair treatment to all citizens alike." Dedicated to combating anti-Semitism, prejudice, and bigotry of all kinds, ADL played a national leadership role in the development of innovative materials, programs, and services that help to build bridges of communication, understanding, and respect among diverse racial, religious, and ethnic groups. Mr. Lieberman has written widely about the impact of hate crimes and has participated in many seminars and workshops on responses to violent bigotry. He was actively involved in efforts to secure the passage of the Hate Crimes Statistics Act and has helped lead efforts to implement the HCSA throughout the country. The author is indebted to his colleagues, Steven M. Freeman, ADL's Director of Legal Affairs, Debbie N. Kaminer, Assistant Director of Legal Affairs, and Michael A. Sandberg, the League's former Midwest Civil Rights Director, for their many contributions to this article, and to Jeffrey C. Warren for fine editorial assistance.

[2] "Since language is a close and meaningful proxy for national origin, restrictions on the use of languages may mask discrimination against specific national origin groups or, more generally, conceal nativist tendencies." *Arizonans for Official English and Robert Park v. Yniquez,* 69 F. 3rd 920 (9th Cir. 1995) (en banc), *cert. granted,* 116 S. Ct. 1316 (1996).

[3] *1995 Audit of Violence Against Asian Pacific Americans,* National Asian Pacific American Legal Consortium, 1996.

[4] In 1995, the 11 national anti-gay/lesbian violence tracking programs that comprise the National Coalition of Anti-Violence Programs documented 2,212 anti-gay/lesbian incidents — an 8% decrease from the 1994 figures. However, "[i]n general, if there was heightened media and political organizing around gay/lesbian issues, reported incidents increased." *Anti-Lesbian/Gay Violence in 1995,* National Coalition of Anti-Violence Programs, 1996.

[5] Public Law 102-275 April 23, 1990.

[6] The Anti-Defamation League has been compiling data on anti-Jewish vandalism and harassment for the past 17 years. In 1995, a total of 1,843 incidents from 42 states and the District of Columbia were reported to ADL regional offices across the country, representing a welcome 11% decrease from the record-high 1994 figure of 2,066. This decline in reported anti-Semitic incidents — which tracks the drop in crime rates across the country — is the largest in 10 years. For more information, *see 1995 Audit of Anti-Semitic Incidents, Anti-Defamation League,* January 1996 (annual report). In addition, the National Asian Pacific American Legal Consortium (NAPALC) conducts an annual audit of anti-Asian violence. In 1995, NAPALC documented "458 suspected and proven anti-Asian incidents," a slight increase over its 1994 figures. Another finding of the report, however, was a significant increase in the violence associated with these crimes. For more information, *see 1995 Audit of Violence Against Asian Pacific Americans,* National Asian Pacific American Legal Consortium, August, 1996. Figures compiled by the National Coalition of Anti-Violence Programs are discussed in endnote 4, *supra.*

[7] Public Law 103-322 September 13, 1994.

[8] As stated in the International Association of Chiefs of Police's National Policy Center's 1991 Concepts and Issues Paper on Hate Crime: "Swift and effective response to hate crimes helps to generate the degree of trust and goodwill between the community and its law enforcement agency that has long-term benefits for all concerned."

[9] *Racial and Religious Violence: A Model Law Enforcement Response,* National Organization of Black Law Enforcement Executives (NOBLE), September 1985, p.36 [NOBLE report].

[10] For a fine review of these issues, *see 1995 Audit of Violence Against Asian Pacific Americans,* National Asian Pacific American Legal Consortium, August 1996 and *Walk With Pride — Taking Steps to Address Anti-*

Asian Violence, Japanese American Citizens League, August 1991. NAPALC has also noted that a lack of bilingual police officers can exacerbate community fears and mistrust — and may contribute to an inability to initially identify a hate crime incident and create difficulties in interviewing the victim and conducting an effective investigation.

[11] Reporting rates for gay and lesbian hate crime victims is also likely affected by mistrust and fear of the police. The National Coalition of Anti-Violence Programs report, discussed in endnote 4, *supra,* stated that "nearly half (45%) of the victims who sought police assistance said the police response [to their crime] was indifferent (37%) or verbally or physically abusive (8%).

[12] Collecting data under the HCSA — and training officers to identify, report, and respond to acts of violence based on prejudice — demonstrates a resolve to treat these inflammatory crimes seriously. These positive steps can be amplified by involving representatives of affected communities in the training sessions.

Excellent resources now exist to help municipalities establish hate crime response procedures. ADL has developed a number of hate crime training resources which are available to communities and law enforcement officials, including a comprehensive guide to hate crime laws, a 17-minute hate crime training video on the impact of hate crime and appropriate responses (produced in cooperation with the New Jersey Department of Law and Public Safety), and a handbook of existing hate crime policies and procedures at both large and small police departments. ADL's anti-bias initiatives, coordinated through our "A World of Difference Institute," are most often used as proactive measures to help educators, employers, and civic leaders develop the skills, sensitivity, and knowledge to combat bigotry and encourage understanding and respect among diverse groups in the classroom and in the workplace.

[13] *Hate Crime Statistics Act 1991 Report,* U.S. Department of Justice/FBI, Criminal Justice Information Services Division.

[14] *Hate Crime Statistics Act 1992 Report,* U.S. Department of Justice/FBI, Criminal Justice Information Services Division.

[15] *Hate Crime Statistics Act 1993 Report,* U.S. Department of Justice/FBI, Criminal Justice Information Services Division.

[16] *Hate Crime Statistics Act 1994 Report,* U.S. Department of Justice/FBI, Criminal Justice Information Services Division.

[17] *Hate Crime Statistics Act 1995 Report,* U.S. Department of Justice/FBI, Criminal Justice Information Services Division.

[18] In part because of the FBI's fine education and outreach efforts, the number of law enforcement agencies reporting HCSA data has increased in each of the five years of the HCSA program. With the exception of 1994, the number of hate crimes reported to the FBI has also increased every year. The 1994 numbers — a 24% decrease from 1993 numbers — may have reflected the national trend of receding crime rates, but also provides evidence of incomplete reporting along with a disturbing fall off in reporting by agencies that had reported HCSA data to the FBI in the past.

[19] Dozens of law enforcement agencies across the country have promulgated new policies and procedures for addressing hate violence. Building on model policies, drafted by, among others, the International Association of Chiefs of Police and the National Organization of Black Law Enforcement Executives, departments have complemented their participation in the HCSA data collection mandate with the development of protocols for their officers on how to identify, report, and respond to hate violence.

[20] NOBLE report.

[21] The measure attracted 52 co-sponsors, including 17 Republicans. The Senate Judiciary Committee approved S. 1624 on April 25.

[22] Public Law 104-155 July 3, 1996.

[23] This is confusing, however, since the FBI has never received a separate appropriations for outreach and training on the HCSA.

[24] At least two BATF agents were removed from the arsons probe. A Treasury Department investigation released in April 1996, concluded that 31 Treasury law enforcement officials had attended the annual gathering of law enforcement officials in eastern Tennessee since it began in 1980, and that 15 of them had witnessed racist activities or misused government equipment in attending. An eight-month investigation by the Justice Department's Office of Inspector General concluded that 44 former and current Justice Department employees had attended the gathering. The DOJ report, released in March 1996, found no evidence that any Justice Department employee had "engaged in racist or other misconduct while at the Roundup."

[25] For example, in remarks at the rededication of the Mount Zion African Methodist Episcopal Church in Greeleyville, South Carolina on June 12, 1996, President Clinton said: "I want to ask every citizen, as we stand on this hallowed ground together, to help to rebuild our churches, to restore hope, to show the forces of hatred they cannot win. I want to ask every citizen in America to say we are not going back, we are not slipping back to those dark days."

[26] Joint statement by James E. Johnson, Treasury Department Assistant Secretary for Enforcement, and Deval L. Patrick, Assistant Attorney General for Civil Rights, hearings before the Senate Judiciary Committee on June 27, 1996.

[27] Report of the Community Relations Service Church Burning Response Team, September 30, 1996.

[28] ADL professionals and community leadership, for example, have participated in community institution security conferences, organized community-wide coordinating sessions on the arsons, met with federal, state, and local law enforcement officials to share information on the investigations, assessed the state of hate crime statutes in affected states, and communicated with Pastors and congregants from a number of the churches to offer assistance and support. In association with the National Urban League, ADL took out advertisements in major newspapers and has raised more than $330,000 for rebuilding efforts.

[29] The Congressional Black Caucus held hearings on June 20, 1996 and the Senate Judiciary Committee held hearings on June 27, 1996.

[30] Public Law 104-155 July 3, 1996, Section 2. Findings.

[31] Public Law 104-201 September 23, 1996.

[32] In October 1996, federal criminal civil rights charges were brought against an individual who allegedly sent computer messages threatening to "hunt down and kill" Asian American students at the University of California at Irvine. This is apparently the first federal civil rights prosecution for a crime committed with a computer.

The issue of hate on the Internet is worthy of further study. The global nature of the Internet permits the Web to reach a worldwide audience — in a simple and inexpensive manner. Many traditional hate groups, like the Ku Klux Klan and other white supremacist groups, have already established anonymous fundraising and propaganda web sites, many designed to appeal to young, impressionable hackers. While the use of the Internet by cyberhaters, racists, Holocaust deniers, and organized hate groups is disturbing, ADL believes strongly that censorship is not the best way to confront these messages. Rather, the Internet must be closely monitored, with people of goodwill and organizations exposing the bigot and countering lies and distortions with accurate information. For more information on this issue, *see The Web of Hate: Extremists Exploit the Internet,* Anti-Defamation League, 1996. The League's website address is www.adl.org.

[33] *The Role of Telecommunications in Hate Crimes,* National Telecommunications and Information Administration, U.S. Department of Commerce, December 1993.

[34] Facilitating Justice Department prosecutions of certain hate crimes in which the victim was not necessarily engaged in a traditional federally protected activity — such as the murder of Yankel Rosenbaum in Crown Heights, New York in 1991.

[35] Despite the fact that a significant number of hate crimes are committed against gays and lesbians, hate crime statutes in only 15 states now include crimes directed at an individual because of his/her sexual orientation. Currently, the Justice Department has limited authority to enhance penalties associated with hate violence directed at gay men and lesbians in bias-motivated federal crimes, since sexual orientation is one of the categories included in the Hate Crime Sentencing Enhancement Act.

Even in these limited circumstances, however, federal officials investigating a double murder in Shenandoah National Park in June 1996 seemed to downplay the relevance of the couple's sexual orientation.

[36] As with other groups protected by both federal and state laws, gender-based crimes should be covered by this federal hate crime statute. Importantly, in the past five years, as states have realized that it is difficult to distinguish race-based and religion-based crimes from gender-based crimes, the trend in a number of state legislatures has been to include gender in hate crimes legislation. In 1990, only seven of the statutes in the 31 states which had hate crime statutes included gender. Today, 17 of the 39 states with hate crimes statutes cover victims chosen by reason of their gender. In fact, gender is the most often included protected category in state hate crime statutes after "race, religion, and ethnicity" categories included in all hate crime statutes. Like other instances of violent bigotry, prosecutors have discretion in identifying those gender-based crimes which should be prosecuted as hate crimes. As with other hate crimes, prosecutors should be able to press gender-based hate crime charges when they have concrete, admissible evidence of bias. Gender-based crimes were appropriately included as part of the Hate Crimes Sentencing Enhancement Act.

[37] For the most comprehensive state-by-state listing of hate crime statutes, *see 1994 Hate Crime Laws: A Comprehensive Guide, Anti-Defamation League,* 1994. An update of this report will be published in early 1997.

[38] 508 U.S. 476 (1993).

[39] Public Law 102-140 October 28, 1991.

[40] *Bias Crimes: National Bias Crime Training for Law Enforcement and Victim Assistance Professionals,* Education Development Center, Inc., Massachusetts Criminal Justice Training Council, and the Office for Victims of Crime, 1994.

[41] Public Law 102-586.

[42] *Report to Congress on Juvenile Hate Crime,* July 1996.

[43] This grant, since renewed and expanded, was awarded to Education Development Center, Inc., the Massachusetts-based agency which had previously developed the very useful OVC curriculum for victim service professionals. OJJDP and EDC have plans to implement this training program early in 1997.

[44] Public Law 103-322.

[45] *Civil Rights Remedy for Gender-Motivated Violence,* NOW Legal Defense and Education Fund, November 1, 1994.

[46] American schools have an increasingly diverse racial, religious, and ethnic population, a trend that will continue in the coming years. Schools are often the first institutions to reflect changing demographics and variations in our nation's culturally varied population. Every student enters the school building carrying his/her particular cultural norms, practices, beliefs, values, and attitudes. Schools and individual students are greatly affected by intergroup tensions that too frequently accompany a changing, culturally-diverse student body.

[47] Public Law 103-382. Importantly, since the definition of hate crime is taken from the HCSA, the programming in this area can be broadly inclusive.

[48] Federal Register, Vol. 61, No. 128 (July 2, 1996).

[49] The community forums were held in Alabama, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. Transcripts and summaries of the forums are available from the Commission.

[50] A number of state and local authorities have promoted initiatives designed to expand HCSA reporting. In North Carolina, for example, the state Department of Justice has adopted a new strategy to promote HCSA partic-

ipation. Under this new program, Division of Criminal Information (DCI) field representatives invite individual departments to sign a Memorandum of Understanding that the agency will report HCSA data in return for training by the North Carolina Justice Academy and DCI technical assistance. These efforts have paid off; the FBI's 1995 HCSA report reflects significantly expanded participation from North Carolina law enforcement agencies.

[51] CRS has determined that anti-Semitism can be defined as conflict based on national origin or race and has offered its services in attacks or threats against Jews and Jewish institutions. In addition, CRS has responded to intercommunal violence directed at individuals on the basis of their sexual orientation on one occasion. On February 17, 1994, Attorney General Reno exercised her authority under 28 U.S.C. 509-510 to direct CRS to intervene in a community dispute involving a campaign of terror and harassment against a lesbian couple in Ovett, Mississippi. In addition, CRS has provided both valuable staff assistance and significant funding for both the FBI and FLETC for their inclusive hate crimes outreach and training programs.

[52] Almost 2,300 of the almost 8,000 hate crimes documented by the FBI under the HCSA for 1995 were reported on the basis of sexual orientation and religion.

[53] Data provided by the Department of Justice as of September 30, 1996.

[54] *Violence and Youth: Psychology's Response,* American Psychological Association, 1993. The APA report asserts that education programs that reduce prejudice and hostility are integral components of plans to address youth violence. The report concludes that conflict resolution and prejudice reduction programs can provide needed information and skills to prevent youth violence.

[55] There are many existing programs designed to address prejudice. For example, ADL's "A World of Difference Institute," founded in Boston in 1985 and now operating in more than 30 cities, provides training and educational programming about the roots and consequences of prejudice. "A World of Difference" combines specially produced television programming, public service announcements, teacher training, curriculum materials, community-based projects, and video resource materials designed to help children and adults explore issues of prejudice and diversity. To date, more than 110,000 elementary and secondary school teachers nationwide have been trained to address prejudice and to better value diversity.

Chapter XV

The Debate over English-Only/ Official English

by Georgina Verdugo and Jayne Park

Introduction

Until relatively recently, legislators in the United States had not seriously considered the designation of an official language. To the contrary, early debates by the Continental Congress turned away from language standardization to accept communication in any language that would promote the principles and purposes of the new Republic.[1] The early government of the newly formed United States decided against designating an official language, either for its Constitution or for use in federal government. Instead, tolerance of non-English speaking populations has co-existed with the increased use of English as the unofficial language of government and public communications throughout the country.

There have been attempts in the past to eradicate the use of foreign languages. Germans, Cajuns, Native Americans, and Spanish and Asian language speakers have each been the focus of concerted state and local efforts to force the use of only one language — English. Additional friction has been historically felt during high migration patterns to the United States, as well as during times of war and conflict. These periods have been traditionally coupled with the rise of nativism and xenophobia. When there have been fewer newcomers, as well as during relatively peaceful times, use of minority languages has not raised questions, whether the question is of loyalty or assimilation.[2]

However, since the beginnings of this last wave of immigration, and particularly over the last 15 years, the debate has ignited between continued protection of minority language rights and the designation of English as the official language of the United States. While more than 97% of all persons residing in the United States speak English[3], proponents of an official language have stirred the debate beyond language designation. They advocate laws which would restrict the use of languages other than English in schools, government, and in the workplace, and seek to curtail use of court ordered remedies that allow non-English voting, bilingual education, and other multilingual service delivery under Title VI of the Civil Rights Act of 1964.[4]

But parallel to the growth of population of language minorities in the United States has been the continuation of severe inequities suffered by foreign language speakers. Language designation and restrictions have been recognized as having a prominent role in national origin discrimination and limitations on individual rights. Contrary to the assertions of English-Only/Official English proponents, rather than encouraging English acquisition, their proposed measures create a hostile and divisive atmosphere that limit rather than promote fluency.

As we have seen in the last Congress and in recent court decisions, the debate regarding English-Only/Official English has in many ways avoided the facts and complexities that underlie the issue of language use and national origin discrimination. While early discussions about a national language looked at the acceptance of a dominant tongue, the new debate instead attacks the speakers themselves. Xenophobia and racism have expanded the assault against immigrants into the assault against *all* foreign language speakers.

This paper seeks to examine the recent legislative and legal debates, arguments and positions, explaining the foundations, and misconceptions that have led to the current state of increased national origin discrimination and the threat to language rights. In addition, the paper offers several recommendations to both Congress and the Clinton Administration in its next term, to ensure the protection of language minorities under our nation's civil rights laws.

The Foundations of Language Rights

Meyer v. Nebraska — Constitutional Provisions

Because of the high degree of language diversity throughout the United States, states have provided a variety of services to accommodate non-English or limited English speakers. For example, several states from Pennsylvania to Louisiana have published laws in more than one language, while many states have provided education and assistance in languages in addition to English.

Early monolingual efforts to limit uses of foreign language in state education resulted in the landmark decision of *Meyer v. Nebraska*[5], where the Supreme Court declared unconstitutional laws which restricted the use of non-English languages. In *Meyer,* the Supreme Court struck down a state statute that prohibited the teaching of any subject in a language other than English to students below ninth grade in public or private schools.[6] While there was no specific language right carved out by *Meyer,* the Court looked to the due process clause of the Fourteenth Amendment in recognizing that certain language limitations deny liberty — namely, the rights of linguistic minority pupils to acquire knowledge, their parents' right to control the education of their children, and the teachers' right to practice their profession.

In recognizing the true effect of the Nebraska statute on foreign language speakers, the Court articulated the reality of a diverse population:

> *The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced with methods which conflict with the Constitution — a desirable end cannot be promoted by prohibited means.*

Meyer has been a foundation for Constitutional protections for all who speak languages other than English.[7] Following *Meyer,* several other Supreme Court cases also declared unconstitutional laws which attempted to restrict the use of non-English languages. In *Bartels v. Iowa,* an Iowa statute requiring that all teaching be conducted only in English was declared unconstitutional.[8] In the 1926 case of *Yu Cong Eng v. Trinidad,* a state statute which prohibited the keeping of accounting books in any language other than English or Spanish was unconstitutional because of its denial of equal protection to Chinese merchants.[9] Additionally, a Hawaii statute that singled out foreign language schools for stringent government control was struck down as a denial of due process under the Fifth Amendment in *Farrington v. Tokushige.*[10]

Title VI of the 1964 Civil Rights Act

Under Title VI of the Civil Rights Act, programs that receive federal funding are prohibited from discrimination. Title VI states:

> *No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, or be subjected to discrimination under any program or activity receiving federal financial assistance.*[11]

Title VI obligations extend to programs administered by both government agencies and the private sector, including state and local agencies, postsecondary educational institutions, and private companies that either (a) receive federal assistance "as a whole" and/or (b) are in the business of providing education, health care, housing, and social services.

While some state and federal programs have instituted varying levels of assistance and services, there are no uniform standards that provide guidance for agencies. For example, while some federal agencies have sought to provide service delivery in languages that would serve large non-English and limited English speaking populations, there has been no attempt to institute guidelines or regulations to either enforce Title VI obligations, or provide consistent attention to the needs of language minority communities.

Additionally, relying on both case law and Title VI, private citizens have brought suit to enforce Title VI to provide bilingual services. In *Pabon v. Levine*[12] plaintiffs argued that they were wrongfully denied unemployment benefits because they failed to receive notices of appeal rights.[13]

Lau v. Nichols — Foundations of Bilingual Education

Under Title VI and the Equal Educational Opportunities Act, school districts are required to provide assistance to students who are not fluent in English that ensures they receive the same educational opportunities as fluent English students. As the U.S. Supreme Court in *Lau v. Nichols*[14] recognized,

> *[T]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education... Imposition of a requirement that before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful...*

What this means is that under *Lau*, school districts must do more than just provide English-only instruction; students must be provided with programs for English Language Development (ELD) that will give them the skills necessary to compete academically with their English speaking peers. The Act also requires school districts to ensure that the programs result in students overcoming language barriers in education. Both state agencies and the U.S. Department of Education's Office for Civil Rights have developed *Lau* guidelines to monitor compliance, but more effort is needed to guarantee that compliance at all levels.

The Relationship Between National Origin and Language

Both the courts and legislatures have recognized language as a basis for national origin identification. In *Hernandez v. Texas*[15], the Supreme Court acknowledged that the use of peremptory challenges against Spanish-speaking and Spanish surnamed jurors was prohibited under the Equal Protection Clause of the Fourteenth Amendment. Additionally, in *Saint Francis College v. Al-Khazraji*[16], the Supreme Court permitted an Arab professor to file a Title VII employment discrimination claim on the basis of his ancestry and ethnic characteristics, including language. The lower courts have reached similar conclusions.[17]

Congress has also recognized that remedial statutes intended, in whole or in part, to rectify historical discrimination and benefit ethnic minorities, must address their linguistic identity. These statutes include the Voting Rights Act of 1965, as amended in 1975 and 1992, 42 U.S.C. § 1973 *et seq.* (1992); the Bilingual Education Act of 1968, 20 U.S.C. §§ 3221-3262 (1982); the Court Interpreters' Act, 28 U.S.C. § 1827 (1988); and the Equal Educational Opportunity Act, 20 U.S.C. § 1703(f) (1982).

For example, with respect to voting rights, the 94th Congress found that:

> *[V]oting discrimination against citizens of language minorities is pervasive in scope. Such minority citizens are from environments in which the dominant language is other than English...[W]here State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process.*[18]

Finding that voter registration and materials written only in English were the functional equivalent of maintaining an English language literacy test, Congress enacted and reauthorized the language assistance provisions of the Voting Rights Act to protect against systemic and pervasive discrimination based upon language use.[19]

The federal government has recognized — at least provisionally — that citizens and residents deserve the full range of interactions with their government irrespective of their primary language. Thus, for example, EEOC regulations acknowledge the inherent relationship between language, national origin, and discrimination, because the "…primary language of an individual is often an essential national origin characteristic…" The EEOC interprets national origin discrimination to include discrimination against an individual who has the physical cultural *or linguistic* characteristics of a national origin group.[20]

104th Congress and English-Only Legislation

In an attempt to capitalize on heightened anti-immigrant sentiments and perceptions, seven pieces of English-Only/Official English legislation were introduced during the 104th Congress. While each bill varied in limitations on language use, the potential for discriminatory impact remained a universal threat. Two bills that received the greatest degree of focus were H.R. 123 ("Language of Government Act of 1995" introduced by Rep. Emerson) and S. 356 ("Language of Government Act of 1995" introduced by Senator Shelby). As introduced, both bills would:

(1) declare English the official language of the federal government;
(2) mandate that all official business of the federal government be conducted in English;
(3) give standing to sue to any person injured from a violation of this law;
(4) repeal inconsistent federal laws that protect language rights; but
(5) would not preempt any state law.

As debated, some proponents sought particular exceptions to the legislation. These exceptions addressed emergency public health protections; the teaching of foreign languages; actions, documents, or policies necessary for international relations, trade, or commerce; and documents that utilized terms of art or phrases in languages other than English. *No provision in any legislative version sought to increase, improve, or in any way address English language proficiency.*

During the second Session of the 104th Congress, the House took up an extended version of H.R. 123, as well as H.R. 351, which would repeal language provisions of the Voting Rights Act. Citing the extreme economic burden to government, a perceived threat to English use, and alleged promotion of English use, both bills passed a House vote, but failed to move in the Senate. The original Senate version of the bill failed to move out of the Committee on Governmental Affairs. For both versions, the Clinton Administration threatened to veto any legislation that would limit bilingual education or language assistance provisions of the Voting Rights Act.

However, the Administration failed to recognize the inherent danger in all forms of English-Only/Official English legislation. Despite its multitude of forms, the primary goals of English-Only/Official English legislation are to prohibit or severely restrict successful measures used to address and remedy discrimination, as well as to prohibit service delivery and access to justice to language minority communities. Even "purely symbolic" measures declaring English as the official language do nothing but promote private discrimination against non-English speakers.[21] Couched in illusory and unfounded arguments that the use of English in this country is threatened, proponents fail to address measures that would *increase* English acquisition, and instead increase intolerance and misunderstanding.

For example, the cost to government for Constitutional compliance and increased efficiency is nominal. According to the General Accounting Office, during the period 1990-1995, more than 99.9% of all federal documents and publications were printed in English. Additionally, in a GAO study, 79% of reported jurisdictions provided oral assistance on election day in non-English languages at no cost to taxpayers.[22] Such documents and assistance help federal tax collection and compliance, as well as providing citizens with the opportunity to exercise their right to vote.

Despite increased accommodations for non-English speaking residents and citizens, data shows that the rate of English acquisition has accelerated. Language minorities are learning English at a rate equal to or faster than earlier immigrants.[23] To maintain this steady progress, the Administration and Congress must act to protect *all* facets of language accommodation and learning.

The *Yniguez* Case

In the spring of 1996, the United States Supreme Court granted a writ of certiorari in *Arizonans for Official English v. State of Arizona ("Yniguez")*, a case which raises important constitutional issues with respect to English-Only legislation. At issue in *Yniguez* is whether Article 28 of the Arizona Constitution declaring English the official state language (an "English-only" law similar to the federal Language of Government Act introduced in the 104th Congress) violates the First Amendment of the U.S. Constitution. This case is the first Supreme Court challenge to a law declaring English as the official language. The Arizona law goes beyond simply proclaiming English to be the official language — it actually prohibits all state government employees and elected officials from speaking any other language while performing government functions.

Article 28, which was adopted by a slim majority of Arizona's voters in a 1988 ballot initiative, makes English the official language of the "ballot, the public schools and all government functions and actions." The law applies to "the legislative, executive and judicial branches of government … all political subdivisions, departments, agencies, organizations and instrumentalities of [the] state including local governments and municipalities."[24] It broadly requires that every level and branch of government, including every entity and person, "act in English and no other language."[25] Under this Article, any "person who resides or does business in [the] state" has the right to sue to enforce its provisions.[26]

The original plaintiff in this case was Maria Yniguez, an employee of the Arizona Department of Administration who handled medical malpractice claims asserted against the state. Prior to the Article's passage, she had communicated in Spanish with claimants during the course of her work. Once the Article was passed, she stopped speaking Spanish on the job for fear that she would be subject to discipline.[27] After the district court held that Article 28 violated the First Amendment of the U.S. Constitution,[28] the Governor of Arizona, an outspoken critic of the law, did not appeal.[29] However, Arizonans for Official English (AOE), the proponents of the initiative, moved to intervene, and the Ninth Circuit granted them standing to pursue an appeal.[30] The *en banc* panel of the Ninth Circuit Court of Appeals affirmed the district court's ruling, reasoning that Article 28 was overboard and far-reaching, in that it would affect the speech rights of all state and local employees, officials, officers, and non-English speaking Arizonans who had an interest in receiving all kinds of essential information.[31] As examples of the chilling effect of the provision, the court noted it would limit the speech of teachers speaking in the classroom, the translation of judicial proceedings in courtrooms, the issuing of state university diplomas in Latin, and the ability of judges performing weddings to say "Mazel Tov."[32] Even the State of Arizona conceded that prohibiting the use of other languages would make the delivery of government services more inefficient.[33]

When the Supreme Court accepted the appeal, it asked for additional technical issues to be briefed, including whether AOE had standing to maintain an appeal (an issue addressed by the U.S. Department of Justice and others as *amicus curiae*). The Supreme Court's attention to the procedural issues, both in its initial request as well as in the oral argument of the case, leaves open the possibility that it will render a decision which will not directly address the constitutional question.

Given the limited argument addressed by the Department of Justice in its brief, the Administration sends a message of only procedural attention to this important case. The Administration, through both the Department of Justice, as well through other civil rights enforcement agencies, must advance the substantive constitutional threats apparent in the cases that will likely follow this challenge.

Recommendations

Despite recognition of the importance of bilingual education and language assistance provisions in voting, the Clinton Administration could have done considerably more in the past two years to ensure the protection of language minorities under our nation's civil rights laws. Executive policy and enforcement initiatives have been lacking in such areas as education, health care, and voting assistance. In its next term, the Clinton Administration must broaden both its understanding, as well as its implementation and enforcement of civil rights in the area of language assistance, accommodation, and Constitutional protections. Specifically:

1. The Clinton Administration must continue to oppose any new legislation in Congress to make English the official language of the government of the United States. Additionally, the Administration should fully support legislation that continues to protect against such threats, including funding for State Legalization Impact Assistance Grants (SLIAG Grants) suggested under the Immigration Reform and Control Act of 1986,[34] as well as public–private initiatives and tax incentives for the private sector to provide both language classes and assistance.
2. The Clinton Administration must also continue to strongly oppose any new proposed legislation that would seek to repeal the bilingual ballot provisions (Section 203) of the Voting Rights Act of 1965. Under the Act, jurisdictions must provide language voting assistance where any single language-minority voting age citizen population is 5% or more of the total adult-citizen population, or where there are at least 10,000 language-minority voting-age citizens in a single language group, and the illiteracy rate of such persons as a group is higher than the national illiteracy rate.

   The Department of Justice is authorized under the Act to sue noncomplying jurisdictions. The Department's enforcement efforts have been inconsistent. Without the Department's vigorous enforcement, Section 203 is virtually worthless. In New York City, and in certain counties in California, the Department has regularly monitored for Section 203 compliance. However, the Department's enforcement activities in many other jurisdictions have been altogether absent. We strongly urge the Department of Justice to increase its monitoring and enforcement efforts to ensure that all jurisdictions are in compliance.
3. The Administration must continue to expand both guidance and directives that will enforce Title VI in full measure of the law. For example, strong directives should be made by the Department of Health and Human Services (DHHS) to develop and implement regulations that will ensure equal access to health care for language minorities. In its 1995 report, the Citizens' Commission pointed out that the Clinton Administration had demonstrated greater concern for the health of minority Americans than previous Administrations, but that significant problems remained.[35] For example, according to the report, the Clinton Administration had been taking steps to re-examine the need for bilingual communication services in health facilities, an issue that had languished under the Reagan–Bush Administrations.[36] Since this last report, no significant progress has been made.

   The Administration must act now to ensure that appropriate regulations are adopted. Absent uniform guidance, significant language barriers will remain in the provision of health care and other services to the non-English and limited English speaking population.
4. The Administration must continue its support of all aspects of bilingual education, including funding, implementation, and compliance. After a long history of virtually nonexistent enforcement by the Office for Civil Rights for the Department of Education, the Department has only now

begun to act upon its recognition of the need for compliance. We applaud the efforts to combine resources and enforcement authority between the U.S. Department of Justice and the Department of Education's Office for Civil Rights. While both DOJ and DOE's OCR are able to work together to investigate, monitor, negotiate, and prosecute compliance cases, both agencies must ensure that past policy initiatives continue to move forward. Moreover, more effort is needed, both in the number of cases investigated and pursued, as well as the use of appropriate tests for compliance as a form of guidance for complying school districts.

Endnotes

[1] *See, e.g, Journals of the Continental Congress,* cited in "A National Language Academy? Debate in the New Nation," Heath, Shirley Brice, 11 *International Journal of the Sociology of Language,* 1976, 9-43.

[2] For a complete discussion of the history of the English-Only movement, *see Hold Your Tongue, Bilingualism and the Politics of "English-Only,"* Crawford, James, 1992, Addison Wesley Publishers.

[3] *Languages Spoken at Home and the Ability to Speak English for United States Regions and States: 1990,* Burno, Rosalind, U.S. Dept. of Commerce, Census Bureau Report (CPH-L-133), April, 1993.

[4] Title VI of the Civil Rights Act of 1962, 42 U.S.C. Section 2000d, *et seq.*

[5] 262 U.S. 390 (1923).

[6] *Meyer v. Nebraska,* 262 U.S. 390 (1923).

[7] *See generally, Serna v. Portales Municipal Schools,* 351 F.Supp. 1279 (D.N.M 1972), *aff'd,* 499 F.2d 1147 (10th Cir. 1974) (constitutional right to bilingual education); *Lau v. Nichols,* 414 U.S. 568 (1974) (providing access to education for non-English speaking students); *Hernandez v. New York.* 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (prohibiting automatic peremptory challenges to non-English speaking jurors as a basis of racial discrimination); *United States ex rel. Negron v. State of New York* 434 F.2d 386 (2d Cir. 1970) (right to interpreter in felony trial); *Zamora v. Local 11,* Hotel and Restaurant Union, 817 F.2d 566 (9th Cir. 1987) (requiring translators at monthly union membership meetings); *Perez v. FBI,* 707 F.Supp. 891 (W.D. Tex. 1988) (finding additional terms and conditions of employment applied to Spanish-speaking Latino employees constitutes illegal discrimination).

[8] *Bartels v. Iowa,* 262 U.S. 404 (1923).

[9] *Yu Cong Eng v. Trinidad,* 271 U.S. 500 (1926).

[10] *Farrington v. Tokushige,* 273 U.S. 284 (1927).

[11] 42 U.S.C. Section 2000d.

[12] 70 F.R.D. 674 (S.D.N.Y.) 1976.

[13] *See also, Mendoza v. Blum,* 560 F.Supp. 284 (S.D.N.Y. 1983) (attorney fees awarded to plaintiffs who sued welfare agency for bilingual services for removing steps to provide services); *Sanchez v. Maher,* 560 F.2d 1105 (2d Cir. 1977) (evidentiary hearing to enforce stipulation to provide bilingual services approved by court).

[14] *Lau v. Nichols* 414 U.S. 563, 566 (1974).

[15] 347 U.S. 475 (1954).

[16] 481 U.S. 604 (1987).

[17] *United States v. Alcantar,* 897 F.2d 436 (9th Cir. 1990) (reversal and remand for new trial once defendant made out a prima facie case showing of discrimination in the selection of jurors, by eliminating fluent Spanish-speaking jurors because tapes of the defendant in Spanish would be introduced as evidence); *Gutierrez v. Municipal Court of S.E. Judicial District,* 838 F.2d 1031 (9th Cir. 1988) (striking down an English-only rule), *vacated on grounds of mootness,* 109 S.Ct. 1736, 104 L.Ed.2d 174 (1989); *Zamora v. Local 11, Hotel and Restaurant Union,* 817 F.2d 566 (9th Cir. 1987) (requiring translators at monthly union membership meetings for Spanish-speaking union meetings); *Olagues v. Russoniello,* 797 F.2d 1511 (9th Cir. 1986) (en banc) (recognizing that adverse action against Spanish-speaking persons constitutes unconstitutional discrimination on grounds of national origin), *vacated on grounds of mootness,* 484 U.S. 806 (1987); *Puerto Rican Organization for Political Action v. Kusper,* 490 F.2d 575 (7th Cir. 1973) (upholding use of bilingual materials and assistance in voting); *United States ex rel. Negron v. State of New York,* 434 F.2d 386 (2nd Cir. 1970) (Puerto Rican defendant has a Sixth Amendment right to interpreter in felony criminal trial); *Perez v. FBI,* 707 F.Supp. 891 (W.D.Tex. 1988) (finding additional terms and conditions of employment applied to Spanish-speaking Latino employees constitutes illegal discrimination).

[18] *See* 42 U.S.C. 1973b(f)(1).

[19] *See* Section 4(f)(4), Section 203, Pub.L. No. 94-73 (Aug. 26, 1992, 89 Stat. 400, codified at 42 U.S.C. 1973b(f) and 1973aa-1a; Voting Rights Act of 1965, 79 Stat. 437, as amended by the Civil Rights Act of 1968, 82 Stat. 73; Voting Rights Act Amendments of 1970, 84 Stat. 314, the District of Columbia Delegate Act, 84 Stat. 853, Voting Rights Act Amendments of 1982, 96 Stat. 131, 42 U.S.C. 1973 *et seq.*

[20] 29 C.F.R. 1606 *et seq* (emphasis added).

[21] *See* "Documented Complaints Concerning Language Discrimination, Testimony of the Mexican American Legal Defense and Educational Fund Concerning S. 356, The Language of Government Act of 1995, Submitted to the Senate Governmental Affairs Committee, December 6, 1995," describing incidents of service refused to Spanish speaking customers at J.C. Penney, refusal of child care, physical abuse of students in a Texas high school, and other "enforcement" attempts to promote monolingualism by private employers/employees.

[22] U.S. General Accounting Office. Letter to Honorable Richard C. Shelby, Honorable William F. Clinger, Jr., and Honorable Bill Emerson, Washington, Sept. 20, 1995; United States General Accounting Office, Briefing Report to the Honorable Quentin N. Burdick, United States Senate, "Bilingual Voting Assistance: Costs of and Use of During the November 1984 General Election," 1984.

[23] K. McCarthy & R. Burchiaga Valdez, *Current and Future Effects of Mexican Immigration in California* (1986); C. Veltman, *The Future of Spanish Language in the United States,* 1988; A. Califa, "Declaring English the Official Language; Prejudice Spoken Here," 24 *Harv. C.R.-C.L. L. Rev.* 293, 314 (1989).

[24] Article 28 of the Arizona Constitution, sec.1.(1)(2) and sec.1.(3)(a)(ii).

[25] Article 28, sec.3.(1)(a).

[26] Article 28, sec.4.

[27] *Yniguez v. Arizona for Official English,* 69 F.3d 920, 924 (9th Cir. 1995), *cert. granted,* 64 USLW 3635 U.S. (March 26, 1996).

[28] *Id.* at 925.

[29] *Yniguez,* 69 F.3d at 926.

[30] *Id.*

[31] *Id.* at 932. In footnote 3, on page 924, the Court recognizes the significant contributions of late Judge Thomas Tang of Arizona to the case. Judge Tang was a member of the three-judge panel and the en banc court, and died two days before the en banc oral argument. The decision of the en banc court is essentially identical to the panel opinion. The Court acknowledges Judge Tang's significant contributions to the panel opinion, which reflects his views and wise understanding of the Constitution.

[32] *Id.* at 932.

[33] *Id.* at 942.

[34] Immigration Reform and Control Act ("IRCA"), Pub.L. No 99-603 (Nov. 6, 1986, 100 Stat. 3374) (providing for grants to ESL/adult English education programs, as well as health care for the newly legalized immigrants).

[35] *New Challenges: The Civil Rights Record of the Clinton Administration Mid-term,* page 14, Citizens' Commission on Civil Rights (1995).

[36] *Id.*

[37] *See generally,* Pub. L. No. 94-73 (Aug. 6, 1975) 89 Stat. 400, codified at 42 U.S.C. Section 1973b(f)(1), Section 4(f)(4) and Section 203.

Chapter XVI

Voting Rights Act Enforcement: Confronting Current Challenges

by Scott Sinder

"The right to vote freely for the candidate of one's choice is the essence of a democratic society[.]"[1] Historically, however, African Americans, Latinos, Asians, and Native Americans have been denied the ability to effectively exercise this right in many jurisdictions. This systematic denial of the right to vote prompted Congress to enact the Voting Rights Act of 1965 (the "VRA" or "Act"). In doing so, Congress sought to remedy this abridgment and provide greater enforcement of the Constitutional protections ensured by the Fourteenth and Fifteenth Amendments.[2]

The VRA is the primary mechanism for ensuring that the right to vote of protected classes is not infringed. The Act authorizes the Department of Justice to enforce its substantive provisions.[3] Section 5 of the Act also requires jurisdictions with a history of using certain restrictive practices and of depressed political participation to obtain "preclearance" from either the Department of Justice or the United States District Court for the District of Columbia prior to the implementation of any changes that affect voting.[4]

The Department of Justice's initial VRA enforcement efforts targeted direct prohibitions on the exercise of the franchise. These efforts included, among other things, challenges to literacy tests, poll taxes, and discriminatory registration schemes. Termed "first generation" voting rights cases, these challenges were largely successful; direct barriers to voting have almost been erased from the American political landscape.[5]

Nevertheless, recent legislative and enforcement efforts related to the exercise of the franchise have sought to further facilitate voting for members of relatively disenfranchised communities. The two most prominent examples of these efforts are the 1975 and 1992 amendments to the VRA, which require the provision of bilingual voting materials and assistance,[6] and the enactment of the National Voter Registration Act of 1993.[7]

The 1975 VRA amendments require jurisdictions with substantial concentrations of voters who do not speak English as a first language to provide ballots, voting notices, forms, instructions, assistance, and any other materials that they make available to the public in the language of the applicable minority group as well as in English.[8] Without these bilingual materials, many citizens who are limited English proficient would be effectively denied meaningful use of voting and election materials and hence be denied a well-informed, meaningful vote. The 1992 VRA amendments extended the scope and longevity of these provisions and covered many jurisdictions not previously covered.

The National Voter Registration Act of 1993 ("NVRA") became effective in most states on January 1, 1995. It requires three primary methods of voter registration be used nationwide and was intended to expand the electoral process. First, the NVRA effectively requires that every application for a license to drive, obtain identification or change of address at a motor vehicle licensing office, which also serves as an application to register to vote in federal elections. Second, it requires that all state offices that provide "public assistance" and all "State-funded programs primarily engaged in providing services to people with disabilities" undertake efforts to offer those served by these agencies an opportunity to register to vote in federal elections. And third, the NVRA requires that voters be permitted to register by mail to vote in federal elections.

Eliminating barriers to the franchise, however, does not necessarily ensure effective minority participation in the electoral process. As the Supreme Court recognized early on, "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."[9] Recognition of vote dilution mechanisms led to challenges to political districting systems that systematically prohibited protected classes from electing candidates of their choice. These systems submerged minority voting strength and allowed white majorities which voted as a bloc to repeatedly elect their own candidates of choice.[10] Such challenges were severely undermined by a narrow judicial construction of the Act which required plaintiffs to demonstrate that districting plans purposefully discriminated against minority voters in order to establish a claim.[11]

Congress responded to the Court's decision by enacting the Voting Rights Act Amendments of 1982.[12] Section 2(b) of the VRA now requires that "the political processes leading to nomination or election" for public office must be "equally open to participation by members of a class of citizens" protected by the Act's ban on racial and language-based discrimination.[13] As Pamela Karlan has noted, "the statute is explicitly race- and group-conscious: it asks whether members of classes defined by race are able to participate fully, and it expressly provides that '[t]he extent to which members of a protected class have been elected to office in the [defendant] State or political subdivision is one circumstance which may be considered' in deciding whether an electoral system violates the statute."[14] A claimant, however, need not demonstrate that the electoral system was intended to have such an effect; all that is necessary to establish a Section 2 violation is that the plan has a discriminatory result.

These 1982 amendments to the VRA prompted many states and local jurisdictions to seriously consider — in many cases, for the very first time — the interests of minority voters when they redistricted after the 1990 decennial census. In addition, the Department of Justice review of districting plans submitted by jurisdictions covered by Section 5 of the Act ensured that the interests of minority voters were considered prior to implementation of such plans. Consequently, between 1985 and 1992, the number of black elected officials rose by almost 20%, and the number of Hispanic elected officials rose by more than 50% nationwide.[15]

Thus, in many respects, the gains made during the "first generation" of voting rights activism appear secure. Moreover, as a whole, the Clinton Administration has been a strong supporter of minority voting rights. Nonetheless, the expansion of electoral opportunity envisioned by those who enacted the NVRA, the VRA's bilingual provisions and Section 2 has come under increasing threat, as a result of the Supreme Court's decision in *Shaw v. Reno* and its progeny, attacks on the bilingual requirements of the Act, and intransigence of certain states in implementing the NVRA. What follows is a description of these threats, an evaluation of the Administration's response to date, and suggestions for the manner in which future responses might be strengthened.

I. Implementation of the NVRA

Under the statute, two federal agencies are delegated primary implementation and enforcement responsibilities under the NVRA: the Federal Election Commission ("FEC") and the Department of Justice.

The FEC was delegated the responsibility to devise a form to be employed by the states for mail-in registration for federal elections, and to issue a report to Congress no later than June 30 of each odd-numbered year that assesses the impact of the NVRA and recommends improvements in federal and state procedures, forms, and other matters affected by the NVRA. In June 1994, the FEC issued final regulations which set forth the requirements of the national mail-in voter registration form and a series of state record-keeping and reporting requirements to enable the FEC to better comply with its own Congressional reporting requirements.[16] The rules promulgated by the FEC generally appear to be sound; its challenge is to ensure future compliance with its state record keeping and reporting requirements in order to be able to properly evaluate the impact of the NVRA and effectively consider any possible amendments that may help continue to expand registration opportunities for American voters.

The Department of Justice is charged with the primary enforcement responsibility under the NVRA. There are two general types of enforcement issues: a jurisdiction's wholesale refusal to comply with the NVRA and a jurisdiction's failure to fully comply with NVRA requirements. To date, the Department of Justice and private plaintiffs have successfully defeated wholesale state intransigence. The constitutionality of the NVRA has been upheld by every court, including the two United States Courts of Appeals that have considered the question. Its constitutionality now appears to be beyond question.[17] The Department focus must shift to ensuring full and fair enforcement of the Act and it must vigilantly monitor state compliance, and where necessary, bring enforcement actions to ensure that the universal registration goals embodied in the NVRA are pursued as diligently as possible.

II. The Continued Vitality of the VRA Bilingual Provisions

On January 9, 1995, a bill was introduced in the United States House of Representatives that would have potentially repealed almost all provisions of the VRA for language minorities, defined under the Act as American Indians, Asian Americans, Alaska Natives, and persons of Spanish heritage.[18] The passage of the bill would have likely effectively resulted in almost no federal anti-discrimination protections related to voting for citizens who are American Indian, Asian American, Alaskan natives, or of Spanish heritage. Protections for language minority voters that would have likely been repealed under the bill included, among other things, provisions preventing the use of mechanisms having a discriminatory effect, provisions for judicially ordered use of federal examiners, and provisions for preclearance of voting changes. The bill also raised questions as to whether Section 5 coverage would remain available in various jurisdictions initially covered because of their violations of the bilingual provisions.

The bill was subsequently added to the "English Language Empowerment Act of 1996" as Title II of that Act.[19] Although the English Language Empowerment Act of 1996 was passed by the House on August 1, 1996,[20] it was not considered by the Senate during the 104th Congress. The immediate threat of repeal has therefore passed, but it is likely that the members of the House Judiciary Committee will seek to resuscitate this effort during the next Congress. The Administration in general, and the Department of Justice in particular, must continue to take every step possible to help defeat any legislation that would repeal the bilingual election provisions of the VRA. In the event that such legislation is passed by Congress, the President, as he indicated in his August 1, 1996 letter to Congress, must veto it. The loss of this bilingual assistance would effectively deny millions of Americans participation in the political process.

III. Creating Majority-Minority Districts and Defending Majority-Minority Districts from Challenge

After the 1990 decennial census, state and local jurisdictions drew record numbers of "majority-minority districts" — legislative districts in which minority voters constitute a majority of the eligible voters. The impetus for drawing such districts was prompted, in part, by two factors.

First, a 1986 Supreme Court case entitled *Thornburg v. Gingles*[21] was generally interpreted to require the creation of such districts. In that case, the Supreme Court held that three conditions must be satisfied to demonstrate that a districting plan violates the rights of protected classes under Section 2 of the VRA:

> *that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"; that the minority group "is politically cohesive"; and that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."*[22]

Assuming a challenger is able to demonstrate these conditions, a court cannot conclude that the Act has been violated unless it further finds, under "the totality of the circumstances," that the minority group has been denied an equal opportunity to "participate in the electoral process and elect candidates of its choice."[23] These conditions must be established regardless of whether the claim is brought against a multi-member districting plan that submerges the votes of members of a minority group, as in *Thornburg v. Gingles* itself, or the claim is based on the manipulation of district lines that "fragment[ ] politically cohesive minority voters among several districts or pack[ ] them into one district or a small number of districts, and thereby dilute[ ] the voting strength of members of the minority population."[24]

Thornburg v. Gingles was generally read to require, especially in jurisdictions with a history of discrimination, that majority-minority, single-member districts should be drawn if candidates preferred by the minority group were usually defeated by white bloc voting, and if the minority group was large enough and cohesive enough to elect candidates of its choice within a properly drawn district.

Second, the Department of Justice vigilantly enforced Section 5 of the Voting Rights Act during the 1990 round of redistricting. It objected to plans crafted by Section 5 jurisdictions when they violated the Act, had a retrogressive effect (*i.e.,* placed minority voters in a worse position), or were the result of intentional discrimination.

The results were startling: the overall number of minority office-holders increased substantially and the number of minority members of the United States House of Representatives more than doubled.

Despite this progress, recent decisions by the Supreme Court, starting with *Shaw v. Reno*, now threaten to undermine and perhaps even eliminate the expansion of electoral opportunity that was obtained during the post-1990 reapportionment cycle.

In *Shaw v. Reno*[25] the Supreme Court recognized a new claim based on the theory that "the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a 'color-blind' electoral process."[26] In so doing, the Court permitted a Fourteenth Amendment equal protection challenge by white voters to the State of North Carolina's first African American majority Congressional district since Reconstruction. Three years later, a deeply divided Supreme Court reversed the three-judge district court that had upheld the district on remand, concluding that the district constituted an unconstitutional racial gerrymander in part because "race [wa]s the predominant consideration in drawing the district lines such that the legislature subordinate[d] race-neutral districting principles to racial considerations."[27]

In other opinions during the past two Supreme Court terms, the five Justices who formed the majority in each of the post-*Shaw v. Reno* electoral districting cases have attempted to clarify the elements of what has become known as a *"Shaw"* claim.[28] It appears that four of those Justices — Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas — take a dim view of any use of racial classifications and appear to question the constitutionality of the VRA itself. Justice O'Connor — the fifth Justice in the *"Shaw"* majorities — has a somewhat more tempered view. In *Bush v. Vera,* the most recent voting rights decision to be issued by the Court, Justice O'Connor issued a special concurrence in an effort to set forth her view.[29] She explained that five principles govern the review of equal protection challenges to minority-majority districts:

1. *First, so long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally*

create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny.

2. *Second, where voting is racially polarized, § 2 prohibits States from adopting districting schemes that would have the effect that minority voters 'have less opportunity than other members of the electorate to . . . elect representatives of their choice.' § 2(b). That principle may require a State to create a majority-minority district where the three* Gingles *factors are present — viz., (i) the minority group 'is sufficiently large and geographically compact to constitute a majority in a single-member district,' (ii) 'it is politically cohesive,' and (iii) 'the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'*
3. *Third, the state interest in avoiding liability under VRA § 2 is compelling. If a State has a strong basis in evidence for concluding that the* Gingles *factors are present, it may create a majority-minority district without awaiting judicial findings. Its 'strong basis in evidence' need not take any particular form, although it cannot simply rely on generalized assumptions about the prevalence of racial bloc voting.*
4. *Fourth, if a State pursues that compelling interest by creating a district that 'substantially addresses' the potential liability, and does not deviate substantially from a hypothetical court-drawn § 2 district for predominantly racial reasons, its districting plan will be deemed narrowly tailored.*
5. *Finally, however, districts that are bizarrely shaped and non-compact, and that otherwise neglect traditional districting principles and deviate substantially from the hypothetical court-drawn district, for predominantly racial reasons, are unconstitutional.*[80]

These five principles can be restated as three essential points. First, Justice O'Connor attempts to eliminate any concern that either the VRA, as a whole, or Section 2 is unconstitutional. Given the composition and views of certain members of the current Court, this statement assures that one of the primary tools to ensure equal electoral opportunity will be preserved. Second, Justice O'Connor further clarifies that not only can state and local jurisdictions take race into consideration when drawing electoral districts, but they may be required to take race into account if the minority voters would not otherwise have an equal opportunity to participate in the electoral process and elect representatives of their choice within the meaning of Section 2, as interpreted in *Thornburg v. Gingles.* Third, if a state or local jurisdiction does not substantially deviate from its traditional redistricting criteria or a plan drawn by a court to comply with Section 2, those districts will be upheld as constitutional.

Justice O'Connor's views are helpful from two primary vantage points. First, the approach clarifies that Section 2 and VRA compliance provides a compelling state interest justifying majority-minority districts. Second, it establishes benchmarks based on state law; if a district's shape is in accord with state law requirements the district should otherwise be upheld if drawn to comply with Section 2.

If state law does not provide a benchmark, then Justice Souter's dissent in *Bush v. Vera* that, "after three rounds of appellate litigation seeking to describe the elements and define the contours of the *Shaw* cause of action, a helpful statement of a *Shaw* claim still eludes this Court" is well taken."[81] To the extent the majority has failed to provide such guidance, Justice Souter emphasized that "[t]he Court has apparently set itself upon a course of . . . reviewing challenged districts one by one and issuing opinions that depend so idiosyncratically on the unique facts of each case that they provide no real guidance to either lower courts or legislatures."[82] Justice Stevens echoed these same sentiments: "Regardless of the route taken by the States, the Court has guaranteed that federal courts will [now] have a hand — and perhaps the only hand — in the 'abrasive task of drawing district lines.'"[83] Hence,

> *States seeking to comply in good faith with the requirements of federal civil rights laws "now find themselves walking a tightrope: if they draw majority-black districts they face*

> *lawsuits under the equal-protection clause; if they do not, they face both objections under section 5 of the Voting Rights Act and lawsuits under Section 2.'*"[34]

We are thus at a critical crossroads. These recent decisions directly threaten to once again exacerbate the vote dilution of minority communities. Vote

> *dilution not only can deprive minority voters of the important symbolic achievement of being represented by preferred members of their own group, it can deprive them of a committed advocate in councils of government . . . [and] of the substantial benefits that government bestows . . .* [35]

The question now becomes: what can the Department of Justice do in the wake of these Supreme Court decisions in an effort to continue to combat this threat? To begin, the Department should consider the following actions.

First, the Department should not concede defeat, but should continue to vigilantly defend majority-minority districts and continue to press forward with Section 2 challenges. Three appellate court decisions that have been issued since *Bush v. Vera* was decided in June each demonstrate the continuing vitality of the VRA.[36] The Department of Justice must continue to vigilantly assert and prosecute such challenges.

Second, the Department should respond to the principles articulated by Justice O'Conner by pressing covered jurisdictions to continue to create majority-minority districts where necessary to comply with the VRA. Even in the cases in which the Court has concluded that the districts at issue were the result of an unconstitutional "racial gerrymander," more compact majority-minority districts could have been drawn instead. The Department of Justice should insist that majority-minority districts be drawn that do not substantially deviate from a state's traditional redistricting criteria (to satisfy Justice O'Connor's concerns); and the Department should continue to assert Section 2 challenges against any districting plan that foregoes including such districts in response to the threat of an equal protection challenge.

Third, the Department of Justice should continue to press its arguments that cohesive minority communities should be accorded the same right as any other community of interest to constitute the majority in an electoral district. Two more cases before the Court this term will permit the Court to revisit its districting jurisprudence and refine and reconsider the principles that should be applied in these cases.[37]

Fourth, the Department should consider in appropriate circumstances encouraging jurisdictions to use multi-member districting schemes with alternative voting mechanisms that would ensure that any community of interest large enough to elect its candidate of choice in a properly drawn single-member district would have the opportunity to elect its candidate of choice within the multi-member district. Such an approach in some instances would side-step the inherent tension that is reflected in the Supreme Court's consideration of districting cases. Simply put, that tension pits the majority's fear of institutionalizing racial divisions, on the one hand,[38] against the dissenters' more practical realization that, unfortunately, such divisions do all too often exist in our society and, where they do exist, communities of interest based on race or language are as entitled to legislative representation as any other communities of interest that exist in this country.[39] Both of these views share one essential feature — viewing the redistricting as a largely outcome determinative endeavor. As the Court noted in *Bush v. Vera*, "[t]he final result seems not one in which the people select their representatives, but in which the representatives have selected the people."[40] This is a reality that the Court has long recognized:

> *It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may*

> *pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences. . . . Politics and political considerations are inseparable from districting and apportionment.*[41]

Multi-member districts that employ alternative voting mechanisms do not have this drawback.[42] In these systems,

> *No one needs to decide in advance what a group is. The voters make that decision by the way they cast their ballots. . . . No one needs to decide whether a minority group identity is the only or the primary identity. The voters do that by the way they vote.*[43]

Moreover, if properly conceived, such districts might be beyond challenge under either the *Thornburg v. Gingles* Section 2 or the *Shaw* "racial gerrymandering" analyses. In short, the time for a more careful evaluation of the proposals championed by Lani Guinier may now be upon us.

Finally, the Administration should move for the repeal of 2 U.S.C. § 2c which requires all Congressional districts to be single-member districts. This requirement was enacted in 1967 by a Congress fearful that courts would require any states whose Congressional districts were not in compliance with the then newly articulated "one-person-one-vote" equal district size requirement to hold their next Congressional elections under an at-large system.[44] The Administration should consider asking Congress to repeal this provision so that states can consider multi-member districts with alternative voting mechanisms for all of their representative offices.

IV. Defending Section 5 Preclearance

Although the scope of the Department of Justice's Section 5 preclearance authority was not directly at issue in any of the districting cases discussed above, the Court nevertheless took the Department to task for what it viewed as its overly aggressive approach to the preclearance process.[45]

Three cases before the Court this term will allow it to further define the scope of the Department's Section 5 preclearance authority and when preclearance is required.

In the first case, *Lopez v. Monterey Co., California,* the Court already has issued an opinion in which it reversed the district court and confirmed that it has not changed its traditional view that covered jurisdictions must attain preclearance for all voting changes regardless of whether they are implemented on a permanent or temporary basis.[46]

The second case, *Young v. Fordice,* presents a similar issue. In *Fordice,* the district court rejected established Supreme Court precedent requiring covered jurisdictions to attain preclearance for voting changes, even if those changes were made in an effort to comply with federal law (in this case, the NVRA).[47] The district court concluded that no such preclearance was required.

Finally, in potentially the most significant of the three cases, *Reno v. Bossier Parish Board*[48], the Court will consider the proper scope of the Department's Section 5 preclearance review. More specifically, it will likely address whether a potential violation of Section 2 constitutes a basis for the denial of preclearance under Section 5.

Regardless of the outcome of the *Bossier Parish* case, the Department must continue to vigilantly defend the scope of its Section 5 preclearance authority despite the current judicial climate. In cases like *Young v. Fordice* in which well-established Section 5 preclearance principles are at stake, the Department must continue to defend its responsibilities under the Act.

Moreover, should the Court ultimately decide that Section 2 violations may not constitute a basis for the denial of Section 5 preclearance, the Department will have an even greater responsibility to enforce Section 2 claims through bringing Section 2 enforcement actions.

Conclusion

Recent Supreme Court decisions undermining the vitality of prior Section 2 decisions, attacks on the needs of limited English proficient American citizens, and resistance to implementing registration requirements at the state and local levels all threaten to undermine the great progress in voting rights that has been made over the course of the last three decades. In many instance, the Department of Justice represents the first and only line of defense in the battle to preserve and extend these gains. It cannot give up this fight.

Endnotes

[1] *Reynolds v. Sims,* 377 U.S. 533, 555 (1964). *See also Williams v. Rhodes,* 393 U.S. 23, 30 (1968) ("the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank[s] among our most precious freedoms."); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886) (stating that the right to vote is "a fundamental political right, because preservative of all rights.").

[2] *See* Voting Rights Act of 1965, Pub. Law 89-110, codified at 42 U.S.C. §§ 1971 *et seq.; see also* S. Rpt. No. 439 and Conf. Rpt. No. 711, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. and Admin. News at 2437. The Fourteenth Amendment includes the guarantee that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws" and the Fifteenth Amendment guarantees that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

[3] *See* 42 U.S.C. § 1973j. The Act also authorizes private citizens to assert VRA challenges. *See id.* The contours of the substantive provisions of the Act are described in greater detail in the Chapter XIV of the Citizens' Commission on Civil Rights' 1995 Report: "Voting Rights Act Enforcement: An Agenda for Equal Electoral Opportunity" by Arthur A. Baer and Pamela S. Karlan. All of the enforcement suggestions set forth therein continue to be highly recommended, and, for that reason, they will not be re-stated herein.

[4] This provision is Section 5 of the VRA and it is codified at 42 U.S.C. § 1973c. All or parts of the following states are covered by these Section 5 preclearance requirements: Alabama, Alaska, Arizona, California, Florida, Georgia, Louisiana, Michigan, Mississippi, New Hampshire, New York, North Carolina, South Carolina, South Dakota, Texas, and Virginia.

[5] *See, e.g.,* Samuel Issacharoff, Supreme Court Destabilization of Single-Member Districts, 1995 U. Chi. Legal F. 205 (noting same). Such direct prohibitions, however, still may not have been eliminated entirely. *See, e.g., Morse v. Republican Party of Virginia,* 116 S.Ct. 1186 (1996) (considering whether a registration fee requirement to attend a political party's state nominating convention may be an impermissible poll tax).

[6] *See* Pub. L. 94-73.

[7] The primary provisions of the NVRA are codified at 42 U.S.C. §§ 1973gg *et seq.* In addition to these two primary focuses of increased activity, the Department of Justice continues to lodge challenges to more traditional ballot-access restrictions such as changes in polling places and purges of registration rolls.

[8] *See* 42 U.S.C. § 1973aa-1a(c). The number of communities that must comply with the bilingual provisions was expanded in 1992, and the life of the requirements was extended until at least August 6, 2007. *See* Pub. L. 102-344. This was the second extension of the bilingual provisions since their original enactment in 1975.

[9] *Allen v. State Board of Elections,* 393 U.S. 544, 569 (1969).

[10] *See, e.g., White v. Register,* 412 U.S. 755 (1973).

[11] *See, e.g., Rogers v. Lodge,* 458 U.S. 613 (1982) (holding that a plaintiff must establish purposeful discrimination to maintain such a challenge).

[12] *See* Pub. Law 97-205; *see also* S. Rpt. No. 97-417, 97th Cong., 2d Sess. 34, *reprinted in* 1982 U.S. Code Cong. and Admin. News at 177 (describing same).

[13] 42 U.S.C. § 1973(b) (this provision is Section 2(b) of the VRA).

[14] Pamela S. Karlan, "Democracy and Dis-Appointment" [A Book Review of *The Tyranny of the Majority: The Fundamental Fairness in Representative Democracy* by Lani Guinier (New York: The Free Press, 1994)], 93 *Mich. L. Rev.* 1273 (May, 1995) [quoting 42 U.S.C. § 1973(b)].

[15] Michael E. Lewyn, "When Is Cumulative Voting Preferable to Single-Member Districting?", 25 *New Mex. L. Rev.* 197, 200 (Spring, 1995) (citing U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the

United States 1993 at 280 (noting increasing from 6312 black elected officials to 7517) and at 281 (noting increase from 3147 Hispanic elected officials to 4994).

[16] *See* 59 Fed. Reg. 32311-01 (June 23, 1994) (setting forth the FEC's regulations).

[17] *See Voting Rights Coalition v. Wilson,* 60 F.3d 1411 (9th Cir. 1995), *cert. denied,* 116 S.Ct. 815 (1996); *Association of Community Organizations for Reform Now v. Edgar,* 56 F.3d 791 (7th Cir. 1995). Only one other challenge remains pending. *See Association of Community Organizations for Reform Now v. Miller*, 912 F. Supp. 976 (W.D. Mich. 1996) (appeal pending). The district court dismissed the constitutional challenge to the NVRA and there is no reason to expect the Sixth Circuit to depart from the positions taken by the Seventh and Ninth Circuits and reverse that decision.

[18] *See* H.B. 351 (104th Cong., 1st Sess.) (introduced Jan. 9, 1995).

[19] *See* H.B. 123, Title II (104th Cong., 2d Sess.).

[20] *See* 142 Cong. Rec. H9738-04 (daily ed. Aug. 1, 1996).

[21] 478 U.S. 30 (1986).

[22] *Shaw v. Hunt,* 116 S.Ct. 1894, 1905 (1996) (quoting *Thornburg v. Gingles,* 478 U.S. at 50-51).

[23] *See id.*

[24] *Id.*

[25] 113 S.Ct. 2816 (1993).

[26] *Id.* at 641-2.

[27] *Id.* at 1901.

[28] *See United States v. Hays,* 115 S. Ct. 2431 (1995); *Miller v. Johnson* 115 S. Ct. 2475 (1995); *Bush v. Vera,* 116 S. Ct. 1941 (June 13, 1996).

[29] Her concurrence was unusual because she wrote the majority opinion; she was therefore concurring with herself.

[30] *Bush v. Vera,* 116 S.Ct. at 1969-70 (O'Connor, J., concurring) (citations omitted).

[31] *Bush v. Vera,* 116 S.Ct. at 1998 (Souter, J., dissenting).

[32] *Id.* at 2007 (Souter, J., dissenting) (quoting Karlan, *Post-Shaw Era* 288).

[33] *Id.* at 1991 (Stevens, J., dissenting) (quoting *Wells v. Rockefeller,* 394 U.S. 542, 553 (1969) (White, J., dissenting).

[34] *Id.* at 2006 (Souter, J., dissenting) (quoting Karlan, *Post Shaw Era* 289).

[35] *Bush v. Vera,* 116 S.Ct. at 2000 n. 3 (Souter, J., dissenting) [quoting Davidson, "The Recent Revolution in Voting Rights Law Affecting Racial and Language Minorities," in *Quiet Revolution in the South: The Impact of the Voting Rights Act,* 1965-1990, p. 23 (C. Davidson & B. Grofman eds. 1994)]. Justice Souter later amplified this point:

> *Voting is not just an expression of political preferences; it is an assertion of belonging to a political community.... When legislative districts are defined in ways that exclude the possibility of significant minority representation, potential minority voters see that their votes are not worth casting. Yet electoral mobilization is vital ... to the group members perceptions that they belong to the community*

Id. at 2012, n. 9 (Souter, J., dissenting) [quoting Karst, "Paths to Belonging: The Constitution and Cultural Identity," 64 *N.C. L. Rev.* 303, 347, 350 (1986)].

[36] *See Sanchez v. State of Colorado,* No. 94-1471 (10th Cir. Sept. 30, 1996) (finding that state legislative district unlawfully diluted the voting strength of Hispanic voters); *Teague v. Attala County, Miss.,* 92 F.3d 283 (5th Cir. Aug. 8, 1996) (finding that county legislative districts unlawfully diluted the voting strength of black voters); *Clark v. Calhoun County, Miss.,* 88 F.3d 1393 (5th Cir. July 9, 1996) (finding that county legislative districts unlawfully diluted the voting strength of black voters).

[37] *Abrams v. Johnson,* Nos. 95-1460 and 95-1425 (this case involves a Section 2 challenge to the Georgia congressional districts that were included in a district court-approved plan after the *Miller v. Johnson* remand); *Lawyer v. Department of Justice,* No. 95-2024 (this case involves a Fourteenth Amendment challenge to a majority-minority state senate district that was included in a redistricting plan approved by the district court).

[38] As Justice O'Connor wrote in *Shaw v. Reno,* "'When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here." *Shaw v. Reno,* 113 S.Ct. at 648-49 [quoting *Wright v. Rockefeller,* 376 U.S. 52, 66-67 (Douglas, J., dissenting)]; *see also id.* ("a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.").

[39] Justice Souter aptly represents this view when he comments that, if

> *a legislature may draw district lines to preserve the integrity of a given community, leaving it intact so that all of its members are served by one representative, this objective is inseparable from preserving the community's racial identity when the community is characterized, or even self-defined, by the race of the majority of those who live there. This is an old truth, having been recognized every time the political process produced an Irish or Italian or Polish ward.*

Bush v. Vera, 116 S.Ct. at 2005 (Souter, J., dissenting); *see also id.* ("it is impossible in theory as in practice to untangle racial consideration from the application of traditional districting principles in a society plagued by racial-bloc voting."). As Pamela Karlan has noted, "[t]he core problem that voting rights theory and case law must face today is the persistence of permanent racial faction." Pamela S. Karlan, "The Rights to Vote: Some Pessimism About Formalism," 71 *Tex. Law Rev.* 1705, 1740 (June, 1993).

[40] *Bush v. Vera,* 116 S.Ct. at 1941.

[41] *Gaffney v. Cummings,* 412 U.S. 735, 753 (1973).

[42] In the course of reviewing Lani Guinier's book, *Tyranny of the Majority,* Pamela Karlan describes the mechanics of cumulative voting in this way:

> *In a cumulative system, each voter is given a number of votes equal to the number of seats to be filled, but she is free to distribute those votes among candidates as she sees fit. She can choose among a variety of strategies — "plumping" all her votes behind one candidate she supports intensely or, alternatively, casting her votes for an array of candidates who form a "slate."... Cumulative voting thus encourages shifting, fluid coalition politics in which black voters, white Democrats, and white Republicans all have valuable chips to use.*

Pamela S. Karlan, "Democracy and Dis-Appointment," 93 *Mich. L. Rev.* 1273, 1282-3 (May, 1995) [A Review of Lani Guinier, *The Tyranny of the Majority: The Fundamental Fairness in Representative Democracy* (New York: The Free Press, 1994)].

[43] Lani Guiner, "[E]racing Democracy: The Voting Rights Cases," 108 *Harv. L. Rev.* 109, 134 (1994).

[44] *See* 1967 Cong. Rec. 14780-93 (Daily ed. June 6, 1967).

[45] *Miller v. Johnson,* 115 S. Ct. at 2493.

[46] *Lopez v. Monterey Co., California,* No. 95-1201 (Nov. 6, 1996) (1996 WL 637045).

[47] *Young v. Fordice,* No. 95-2031.

[48] *Reno v. Bossier Parish Board,* Nos. 95-2455 and 95-1508.

Chapter XVII

Federal Fair Housing Enforcement: The Clinton Record at the End of the First Term

by Christine Robitscher Ladd

Introduction

In its 1995 Report, the Citizens' Commission on Civil Rights concluded that "[b]oth HUD and the Department of Justice have made significant, measurable progress across the board in enforcing the Fair Housing Act."[1] The report noted that officials at the Department of Housing and Urban Development (HUD) had taken steps to reorganize the Office of Fair Housing and Equal Opportunity in order to improve the processing of fair housing complaints filed by individuals under the Fair Housing Act.[2] Although the report stated that it was too soon to determine the results of the reorganization, it noted with approval that reasonable cause findings as a percentage of total determinations were up, while the percentage of administrative closures was down.[3] It also reported that the average damage amount achieved through conciliation had increased modestly and the average damages awarded by HUD administrative law judges (ALJs) had increased significantly.[4]

At the end of the first Clinton Administration, it appears that HUD has made only modest progress and has not fully realized the initial hopes for this Administration. There remains enormous variation between the HUD enforcement regions in the processing of complaints — the percentage of charge and no charge determinations and the percentage of cases conciliated or administratively closed vary widely between, and even within, regions from year to year. Greater consistency would reassure the public that HUD fairly administers the Fair Housing Act throughout the country. In addition, HUD's backlog of cases is again growing. Statistics measuring one of the major benchmarks for evaluating HUD's efficiency in processing complaints — the backlog of complaints more than 100 days old — are not even available. Moreover, the report that HUD is required to submit annually to Congress on the Fair Housing Act has not yet been published for 1995. One bright note, however, is the significant increase in monetary relief that HUD has obtained for victims of discrimination, up 34% between fiscal years 1994 and 1995.

On matters of policy, HUD has been stymied in major areas. Promised regulations governing areas such as insurance and lending discrimination have never been issued. It must be acknowledged, however, that a hostile Republican Congress has made it risky for HUD to take a leadership role in the interpretation of the Fair Housing Act. Indeed, any precipitous action by HUD could have had a disastrous effect if Congress had responded by amending the Fair Housing Act and legislating a different interpretation. HUD's quick action on the controversial First Amendment issue (involving the intersection of free speech and fair housing rights) which arose out of a California investigation, has shown, however, that where strong leadership is exerted, difficult issues can be resolved. Conversely, where HUD has failed to show strong and consistent leadership, such as on the issue of occupancy standards, the Fair Housing Act has been left open to legislative attack.

In its 1995 Report, the Commission reported that the Department of Justice had initiated a "series of aggressive initiatives" and, through those initiatives, had "reassert[ed] its traditional leadership role..."[5] Those initiatives, particularly the Department's focus on insurance and lending discrimination and its development of a testing unit, have continued to pay dividends during the last two years. The Housing Section's Testing Unit, in particular, is providing the Department with a steady source of pattern and practice cases and is setting the standard for fair housing testing nationwide. Partly as a result of these initiatives, the monetary relief obtained by the Department has continued to increase over the last two years. Further, the referral to United States Attorneys' offices around the country of so-called "election" cases has allowed the Housing Section to use its resources to litigate pattern and practice cases and expanded the total resources that the Department can devote to the enforcement of the Fair Housing Act.

While the Department continues to lead efforts nationwide in the insurance and lending fields, recent efforts in these areas have been limited to one major insurance redlining case and several narrowly focused lending discrimination cases dealing with discriminatory pricing. Given the Department's primary role in the lending area, it is important that DOJ not abandon the pioneering work done in earlier years on underwriting and marketing cases like *Decatur Federal* and *Chevy Chase*.

Nevertheless, that the Department has accomplished all of this without generating significant controversy in a hostile political climate is remarkable. As the second Clinton Administration begins, and with it the personnel changes that are inevitable, one would hope to see a continuation of the Department's leadership role in the area of fair housing. In particular, the availability of new resources, made possible by the assistance of U.S. Attorneys' offices in handling election cases, should bring a significant increase in the number of new pattern and practice filings. For reasons that are not clear, this increase has not occurred to date.

The remainder of this paper discusses all of these developments in greater detail. Part I analyzes HUD's enforcement efforts over the last two years, from both national and regional perspectives, and reports on several of HUD's policy initiatives. Part II discusses the Department of Justice's enforcement of the Fair Housing Act during fiscal years 1995 and 1996. Part III contains conclusions and recommendations for both HUD and the Department of Justice.

I. Department of Housing and Urban Development

A. Annual Reports

The Fair Housing Act requires that the Secretary of HUD publish an annual report to Congress containing statistics on the number of investigations and cause/no-cause determinations not completed within 100 days of the date the complaint was filed, ALJ hearings not commenced within 120 days of the issuance of a charge or findings of fact and conclusions of law not issued within 60 days after the conclusion of a hearing.[4] HUD last issued such a report in 1994; no annual report has yet been issued for 1995 or 1996. The absence of these reports limits the ability of the Citizens' Commission to provide a comprehensive review of HUD's enforcement efforts under the Fair Housing Act. In particular, statistics were not available to the Commission regarding the number of cases that are more than 100 days old and whether the backlog of old cases is growing. The latter is significant, for it serves as an important indicator to complainants and fair housing advocates of the likelihood of a prompt adjudication of the complainant's grievance. This, in turn, may well determine whether the complainant will decide to make use of the federal enforcement process.

B. Complaints Received

1. National Trends

In its 1995 Report, the Citizens' Commission reported that HUD received the following numbers of complaints during fiscal years 1991-1993:

FY 1991	5,657
FY 1992	6,352
FY 1993	5,973[5]

HUD reports that it received 4,924 complaints in FY 1994 and 2,950 complaints in FY 1995, a 40%

decrease in the number of complaints received in FY 1995 as compared to FY 1994.[8] In part, this declining trend reflected an increasing number of complaints received by substantially equivalent state and local agencies. For example, complaints received by those agencies increased from 4,753 complaints in FY 1994 to 5,232 in FY 1995.[9] However, the declining number of fair housing complaints received by HUD also reflected a decrease in the total number of fair housing complaints received nationally. Fair housing complaints received nationally decreased from 9,583 in FY 1994 to 8,182 in FY 1995. The FY 1994 national total similarly showed a decrease from the 10,187 complaints received in FY 1993.[10] Given HUD's estimate in 1987 that 2,000,000 acts of housing discrimination were still occurring each year,[11] this declining trend in the receipt of new complaints indicates a need for further education and outreach efforts and not, unfortunately, a real decrease in the instances of housing discrimination.

2. Regional Statistics

The decrease in the number of complaints received in FY 1995 was reflected in each of HUD's regional Enforcement Centers except for Region VII-Great Plains, where complaints increased by 4%.[12] In addition, Region I-New England showed only a small decrease in complaints, of 5%.[13] On the other end of the spectrum, complaints received by Region IX-Pacific/Hawaii decreased 72% and complaints to Region III-Mid-Atlantic decreased by 71%.[14] The large variation in both absolute numbers of complaints received in the various HUD regions and the fluctuations in numbers of complaints received year to year within a region is not explained by the HUD Quarterly Trend Analysis reports.[15] HUD should examine these numbers and determine if and where outreach and education efforts are needed and whether other administrative factors are affecting the receipt of complaints in specific regions.

C. Cases Closed

1. National Trends

In FY 1993, HUD closed 6,409 cases.[16] In FY 1994, HUD closed 4,879 cases, a decrease of 24% from the preceding fiscal year.[17] In FY 1995, HUD closed 2,798 cases, a 43% decrease from FY 1994.[18] This dramatic decrease reflects a disturbing trend at HUD — it appears that the backlog of cases is growing, and at an increasing rate. This trend can also be seen by a comparison of complaints received to cases closed. The ratio of HUD's case closures to complaints received decreased slightly from FY 1993 to FY 1994, from one closure per 0.96 complaints received in FY 1993 to one closure per 0.99 complaints received in FY 1994.[19] In FY 1995, HUD's backlog increased because its closure ratio increased to one closure per 0.95 cases received.[20]

2. Regional Statistics

Every HUD region closed fewer cases in FY 1994 than it did in FY 1995.[21] The HUD regions, however, vary markedly in the amount their closures decreased. For example, the smallest decrease in closures was in Region VII-Great Plains, which closed 19% fewer cases in FY 1995 than it did in FY 1994.[22] The greatest decrease in closure rate was in Region III-Mid-Atlantic, which closed 69% fewer cases in FY 1995 than it did in FY 1994.[23] Four other HUD regions showed a decrease in the number of cases closed greater than 40%.[24] The decreasing number of cases closed in most HUD regions resulted in an increasing backlog of cases in six of the 10 HUD regions in FY 1995.[25] The ratio of case closures to complaints received was most troubling in Region VI-Southwest, which had a ratio of one closure per .74 complaints received.[26] Region IX-Pacific/Hawaii showed the greatest success in reducing the backlog of cases by closing 1.62 complaints for every complaint received.[27] The wide variation in closure rates between HUD regions again bears scrutiny by HUD, and efforts should be made to provide more uniform and consistent processing of fair housing complaints across the country.

D. Case Disposition

1. National Trends

Cause findings remained constant at 8% of all types of case closures by HUD in FY 1994 and FY 1995.[28] In absolute numbers, however, the number of cause determinations decreased from 380 to 224 due to the decrease in fair housing complaints received by HUD.[29] No-cause determinations decreased slightly in percentage terms, from 25% of all closures in FY 1994 to 22% of closures in FY 1995.[30] Conciliations increased significantly between FY 1994 and FY 1995, increasing from 23% of all closures to 31% of case closures.[31] Administrative closures decreased from 27% to 21%.[32] Finally, the percentage of complaints withdrawn after resolution stayed constant at 18%.[33]

In general, the small percentage of cause determinations compared to total complaints remains a concern. However, both the increase in the percentage of cases resolved by conciliation and the decrease in the percentage of cases administratively closed are positive trends and show the results of HUD's efforts in these areas.

2. Regional Statistics

HUD's regional statistics categorizing case closures show, again, a great variation between HUD's regional enforcement centers. In FY 1995, cause determinations as a percentage of all closures varied from 0% in Region VII-Rocky Mountain to 20% in Region IX-Pacific/Hawaii.[34] No-cause determinations ranged from 46% in Region III-Mid-Atlantic to 12% in Region VII-Rocky Mountain.[35] In three regions, the percentage of cases closed through conciliation was 50% or greater in FY 1995: Region I-New England (50%); Region VIII-Rocky Mountain (52%); and Region X-NW/Alaska (58%).[36] On the other hand, both Region III-Mid-Atlantic and Region IX- Pacific/Hawaii resolved through conciliation only 13% of the cases they closed.[37] The percentage of cases closed administratively varied between 31% in Region IX-Pacific/Hawaii and 7% in Region I-New England.[38] Such great variations between regions appears to indicate inconsistency in the evaluation of fair housing complaints and in the administration of the fair housing complaint process generally.

E. Compensation to Victims

1. National Trends

HUD reported obtaining $2,437,175 in relief for victims of discrimination in FY 1995, a 34% increase from the $1,821,503 obtained by HUD in the prior fiscal year.[39] This is a significant increase, particularly given that the number of cases closed decreased by 43% between FY 1994 and FY 1995.[40] This increase is likely the result of both an improvement in the number of successful conciliations and an improvement in the amount of relief obtained for victims through conciliation.[41]

2. ALJ Decisions

In 1995, HUD Administrative Law Judges (ALJs) heard 15 cases and found for the complainants in 14 of those cases.[42] Monetary relief in those cases totaled $403,785.[43] Complainants received $322,335 and $81,450 was awarded to the government in the form of civil penalties.[44] This total relief is greater than the total relief of $290,570 awarded in 14 cases in FY 1992, and the total relief of $278, 825 awarded in 11 cases in FY 1993, but is dramatically less than the total monetary award of $852,290 in 13 cases decided in FY 1994.[45] As a result, the average damage award to victims of race discrimination decreased to $38,606 in 1995 from $46,890 in FY 1994.[46] The average damage award in national origin cases was $8,125, which was significantly less than the $60,000 in damages received by each of three victims in the one national origin case decided in FY 1994.[47] The average damage award in familial status cases was $3,788.[48] Again, this showed a significant decrease from FY 1994, when the average in cases involving families with children was $11,703.[49] The average damages awarded in a sex discrimination case was $5,822. No comparison data for this protected class exists for FY 1994.[50] Finally, there was one case where damages were awarded to a victim of discrimination on the basis of disability; the award there was $2,500.[51]

In 1996, HUD ALJs decided only seven cases. Six cases were won by the complainants. The monetary awards in those cases totaled $141,056, including $92,056 in damages to victims of discrimination and $49,000 in civil penalties to the government.[52] With so few cases heard and decided, average damage amounts have little statistical significance. The awards, however, are listed below. In the one race case decided in favor of the complainant, compensatory damages totaled $10,300 for one complainant.[53] One sexual harassment and retaliation case resulted in damages of $22,630 to the victim of discrimination.[54] Two familial status cases were decided by ALJs, resulting in damages of $2,968 to the complainant in one case and $500 to the complainant in the second case.[55] Finally, two disability cases resulted in damages of $50,000 to two complainants in one case and $5,658 to one complainant in the second.[56]

F. Policy Issues

1. Substantially Equivalent Agencies

The Fair Housing Act requires that HUD refer fair housing complaints to state or local agencies if the agency has been certified as one that offers protection of rights, procedures, and remedies that are substantially equivalent to that provided by HUD under the Fair Housing Act. In 1996, HUD decertified three agencies as "substantially equivalent:" Illinois, Tennessee, and Kansas. It is an important part of HUD's responsibilities to ensure that complainants' rights are protected under the Fair Housing Act regardless of whether their complaint is processed by the HUD regional system or a substantially equivalent fair housing agency. Apparently, these states were decertified as a result of valid concerns about their respective enforcement processes. HUD is correct to be monitoring state agencies in this regard. It should continue to review the work of substantially equivalent agencies and make decisions about certification and decertification where appropriate.

2. Occupancy Standards

On March 20, 1991, Frank Keating, then-General Counsel of HUD issued a memorandum setting guidelines for the review of cases involving occupancy standards (the "Keating Memorandum").[57] The Keating Memorandum stated: "the Department believes that an occupancy policy of two persons in a bedroom, as a general rule, is reasonable under the Fair Housing Act."[58] The Memorandum went on to state that the reasonableness of any occupancy policy is rebuttable and that HUD would consider other factors, such as the size and number of the bedrooms, the age of the children, and state and local governmental occupancy requirements, when determining whether an occupancy standard violated the Fair Housing Act.[59]

On July 12, 1995, General Counsel Nelson Diaz issued a memorandum designed to supersede the Keating Memorandum.[60] That memorandum announced that HUD would be issuing official guidance in the future, and that in the interim, only if a housing provider had an occupancy code as broad as the Building Officials and Code Administrators (BOCA) code would it be protected from possible challenge by HUD.[61] This guidance was strongly objected to by the housing industry and, as a result, HUD on September 25, 1995 withdrew the Diaz Memorandum and returned to the Keating Memorandum standard.[62] At the time, HUD announced that the rulemaking process had been "expedited" on this issue; however, no rulemaking process has gone forward to date. HUD's failure to establish clear guidelines in this area resulted in legislative efforts by the housing industry during the last legislative session to amend the Fair Housing Act and establish a national standard of two-persons per bedroom. While these efforts to restrict the reach of the Fair Housing Act were defeated, housing advocates fully expect that similar legislation will be reintroduced in early 1997. HUD's lack of leadership on this issue has created a volatile situation and one in which the Fair Housing Act is in danger of being amended and weakened. HUD needs to provide a strong voice on this issue and show consistency in its support of the Keating Memorandum as a reasonable and workable standard.

3. Other Proposed Rulemaking

HUD announced at the beginning of President Clinton's first term that it would issue regulations governing insurance redlining and mortgage lending discrimination and the disparate impact theory. No action has been taken to begin the rulemaking process on any of these issues. Given the political climate in the last Congress, action by HUD on these issues could have resulted in a legislative backlash. HUD's inaction, therefore, may have been warranted. Yet, as noted above, the absence of leadership can itself fuel legislative attacks on the Fair Housing Act.

4. First Amendment Controversy

In marked contrast with its handling of other policy issues, HUD moved quickly and publicly to preempt a major controversy regarding the intersection between free speech and fair housing rights. The First Amendment guarantees the rights of citizens to express their views; however, the Fair Housing Act forbids harassment and intimidation of persons attempting to exercise their right to fair housing. HUD's guidance, issued by then-Assistant Secretary for Fair Housing and Equal Opportunity Roberta Achtenberg on September 2, 1994, stated that public activities that are "directed toward achieving action by a governmental entity or official," such as distributing fliers, holding open community meetings, writing letters to the editor, testifying at public hearings, conducting peaceful demonstrations, and communicating with governmental entities would be protected and would not be investigated in response to fair housing complaints.[63] HUD made clear, however, that it would continue to prosecute cases where individuals harass or intimidate a person because of their housing choice. HUD's quick response has dampened the public fury over this issue and prevented further damage to or legislative erosion of the Fair Housing Act.

5. Buyer's Agents

On October 1, 1996, Assistant Secretary for Fair Housing and Equal Opportunity Elizabeth Julian, in a letter to Jill Levine, Legal Counsel to The Buyer's Agent, Inc., stated that it would not be a violation of the Fair Housing Act for a buyer's agent to limit a housing search to specific neighborhoods based on the expressed preference of a client, even if those preferences involved protected categories under the Fair Housing Act.[64] That guidance would allow, for example, an agent to show a client housing only in predominately white neighborhoods, if the client so requests. Fair housing advocates protested this interpretation of the Act, citing the Act's goal of promoting integration. Assistant Secretary Julian subsequently retracted the letter. Thus, once again the issue remains unresolved. The problem here, as with HUD's actions on other policy issues such as occupancy standards, is that where HUD does not exercise leadership, the way is open for a legislative solution. Given the current Congress, any legislative solution initiated and supported by the Congressional majority is not likely to be one favored by fair housing advocates.

6. Housing for Older Persons Amendment to Fair Housing Act

As with the issue of occupancy standards, HUD failed to move promptly in setting the standards by which housing could qualify for the "housing for older persons" exemption to the familial status protections of the Fair Housing Act. In response to complaints regarding the lack of a clear definition of "significant facilities and services," HUD held nationwide hearings and issued final regulations on August 18, 1995. Unfortunately, despite this effort, the Fair Housing Act was amended on December 28, 1995. The amendment not only removed the "significant facilities and services" requirement altogether, but also included a "good faith" defense that prohibits monetary damages from being assessed against a person who "reasonably relied, in good faith, on the application of the exemption under this subsection."[65] This is an unfortunate precedent which demonstrates the danger that the Republican Congress now poses. HUD should make every effort to prevent the further erosion of fair housing rights by single issue amendments to the Fair Housing Act.

II. The Department of Justice

A. New Cases Filed

As discussed in the 1995 Commission Report, the Department of Justice has the power under the Fair Housing Act to bring primarily two types of cases: pattern and practice cases and so-called "election" cases.[66] The Department has discretion to file pattern and practice cases where it has information indicating that a pattern and practice of discrimination is occurring. The Department is required to file suit on behalf of HUD complainants who have received a determination by HUD that there is reasonable cause to believe that discrimination has occurred and who have "elected" to have their case heard in federal court.

In the 1995 Commission Report, we noted that the number of election cases that the Department was required to file appeared to be restricting the resources that the Department had to devote to pattern and practice cases.[67] We also noted that the Attorney General had reallocated more resources to the Housing Section and had delegated to the United States Attorneys' offices responsibility for many election cases.[68] Both of these efforts appear to have had a positive effect on the filing of pattern and practice cases. In addition, the Housing Section's Testing Unit has played a significant role in generating pattern and practice cases for the Department.

In FY 1995, the Department filed 132 new cases, including 112 election cases, 15 pattern and practice cases, two Prompt Judicial Actions, and three *amicus* briefs.[69] Of the 15 pattern and practice cases filed, 10 were the result of testing done by the Department, one was a lending case, one was an insurance case, one was a zoning case, and two were pattern and practice cases that were not the result of the Department's testing.[70] In FY 1996, the Department filed 59 new cases, of which 39 were election cases, 17 were pattern and practice cases, and three were *amicus* briefs.[71] Of the 17 pattern and practice cases, five were testing cases, five were lending cases, one was a zoning case, and six were pattern and practice cases that were not the result of the Department's testing.[72]

Clearly, the overall number of new case filings by the Department is decreasing, as a direct result of the decrease in election cases referred to the Department from HUD. Yet, given that the U.S. Attorneys' offices now appear to have primary responsibility for litigating election cases, fluctuations in that docket should not have a significant effect on the workload of the Housing Section. The referral of virtually all of the election cases to U.S. Attorneys' offices should have left the Housing Section free to apply resources elsewhere. Assuming that earlier filed election cases, for which the Housing Section had primary responsibility, are continuing to settle at a normal rate, one would expect to see a commensurate increase in the number of pattern and practice cases filed by the Department. While it appears that the downward trend in the number of pattern and practice cases, noted in the 1995 Commission Report, seems to have stopped, the number of pattern and practice filings by the Department has increased only modestly. With the burden of litigating election cases lifted, one might have expected to find a sharper increase in pattern and practice filings. There is no reason why the Department should not now focus on significantly expanding its pattern and practice docket.

B. Damage Awards

In FY 1995, the Department resolved, by trial or settlement, 94 election cases.[73] These cases resulted in $1,705,499 in total relief.[74] The average, per case, monetary relief in election cases was $18,145. The overwhelming majority of the money recovered went to the victims of discrimination; a total of $10,000 was recovered by the government as civil penalties, and $30,494 went to fair housing and other organizations.[75] The total relief obtained is slightly less on a per case basis than that received by the Department in FY 1993, when it settled or won 67 cases and recovered a total of $1,416,802 in compensatory damages for victims.[76] The average recovery per election case in FY 1993 was $21,146.

Pattern and practice cases, however, showed a steady and significant increase in monetary recovery in FY 1995. During that fiscal year, the Department recovered a total of $19,908,581 in 17 cases. This represents an approximate tenfold increase from FY 1993 when the Department recovered $2,196,750 in 12 pattern and practice cases.[77] Complete data on FY 1994 was not available at the time the 1995 Commission Report was published; however, the 1995 Report notes that in the first half of 1994, the Department settled five cases, resulting in $12,115,000 in monetary relief.[78] The $11 million settlement in the *Chevy Chase* lending case primarily drove the level of total monetary relief in FY 1994. Similarly, the large monetary relief total in FY 1995 was primarily driven by the $16.5 million settlement in the *American Family Mutual Insurance* case, but also included several other large settlements that provided for victims' funds, such as the *Milton* case, which alone resulted in a $1,225,000 settlement.[79]

In FY 1996, the Department settled or tried 51 election cases, resulting in a total recovery of $1,290,112.[80] The per case relief obtained in election cases in FY 1996 was $25,296. Of that total, $119,195 went to fair housing or other organizations and $1,196,407 went to the victims of discrimination.[81] This recovery shows a slight increase in monetary relief in election cases from that of prior fiscal years.

A total of 26 pattern and practice cases in FY 1996 resulted in relief of $15,401,900.[82] A number of cases resolved in FY 1996 involved large settlements that contained either funds for the victims of discrimination or were consolidated with private class actions. These cases included *U.S. v. Mitchell Bros.* ($1.8 million) and *U.S. v. Plaza Mobile Estates* ($2.2 million).[83] Other large settlements came in lending cases: *U.S. v. Long Beach Bank* ($4 million) and *U.S. v. Fleet Real Estate Funding Corp.* ($4 million).[84]

That the Department has achieved this high level of monetary relief for the past three fiscal years is commendable. It represents a trend that fair housing advocates hope will continue, and one that may hinge on the Department's ability to continue its leadership in prosecuting complex matters, such as lending cases.

C. Enforcement Initiatives

1. Testing Program

The Department's testing program has been a remarkable success story. Since 1992, when the first cases based on the Department's own testing evidence were filed, the program has resulted in the filing of approximately 35 pattern and practice cases.[85] A total of almost $4.5 million in monetary relief has been generated by these cases.[86] In FY 1995, eight testing cases were resolved, with a total monetary relief of $743,331.[87] One case alone, *Kings Pointe*, settled for $425,000.[88] In FY 1996, five testing cases were resolved, generating $669,200 in total monetary relief.[89] Again, in FY 1996 one testing case alone, *Jacobson*, accounted for $427,000 in monetary relief.[90] And in the last two months of 1996, two additional testing cases have been settled for a total of $1,475,000 in monetary relief.[91]

Clearly these results are due to the high quality of the testing. Measured by the results obtained, the Department is now way out in front of the private bar and nonprofit sector in litigating testing cases. In addition, the testing program has allowed the Department to develop cases in parts of the country that have had little previous fair housing act enforcement. Testing cases have been brought from Miami, Florida to Sioux Falls, North Dakota. In this way, the Department is fulfilling its mission to enforce the Fair Housing Act from coast to coast, as never before.

The Department's policy requiring pre-suit negotiations in all testing cases, however, appears to have created a backlog of testing cases that are completed but not yet filed. There is no reason why such a policy should slow the process significantly. Given the success of the testing program, the Department should ensure that sufficient resources are devoted to filing these cases in a timely manner.

2. Lending and Insurance Discrimination

The 1995 Commission Report called DOJ's lending discrimination program "one of the Department's most important success stories."[92] This trend has largely continued during the last two fiscal years. In FY 1995, the Department settled for $700,000 *U.S. v.*

Northern Trust Company, a case alleging differential treatment on the basis of race and national origin in mortgage loan underwriting. In FY 1996, the Department settled four lending cases. *U.S. v. Huntington Mortgage Company*, which alleged that African Americans were charged higher commissions for mortgage loans, was settled for $420,000. *U.S. v. Security State Bank of Pecos, Texas*, which settled for $510,000, alleged that consumer loans were sold at higher interest rates based on the race of the customer. *U.S. v. Fleet Real Estate Funding Corp.* resulted in a $4 million settlement in a case alleging higher commissions charged on the basis of race. Finally, *U.S. v. Long Beach Bank*, which alleged differential loan pricing on the basis of race, national origin, gender, and age, was also settled for $4 million. The Department is currently in litigation in one lending case, *U.S. v. First National Bank of Gordon, Nebraska*. That case alleges that Native Americans have been charged higher interest rates and fees for consumer and other loans. In FY 1995, the Department also settled the *American Family Mutual Insurance* case for $16.5 million. This remarkable result came in the Department's first and only property insurance redlining case.

While the results in these cases are impressive, it must be noted that all of the cases except for *Northern Trust* involve allegations that individuals who received loans were charged more for the loans because of their race, national origin, or other protected status. Only *Northern Trust* involved allegations of differential treatment resulting in loan rejections, similar to those brought by the Department in earlier lending cases, such as *Decatur Federal*. Of even greater concern is that the Department closed its investigation against Barnett Bank, which involved allegations of discrimination in underwriting loans, after a messy, public disagreement with the Office of the Comptroller of the Currency over whether to proceed with the case. It is hoped that the Department's current focus on pricing cases does not represent a policy decision to abandon marketing and underwriting investigations and to leave compliance in these areas solely to the voluntary efforts of the lending and insurance industries.

III. Conclusions and Recommendations

During the last two years of the first Clinton Administration, federal enforcement of the Fair Housing Act has continued to show steady improvement. HUD has significantly increased the monetary relief obtained by victims through the administrative process. Successful conciliations are up and administrative closures are down. HUD needs to continue to work for greater consistency between the regional enforcement centers processing fair housing complaints and to provide greater leadership when the Fair Housing Act comes under legislative attack.

The Department of Justice has similarly increased the monetary relief obtained in its cases and has achieved an outstanding level of monetary relief during each of the last three fiscal years. With a system in place to remove the burden of election cases, the Department has been able to focus again on pattern and practice cases. The fair housing community looks to the Department to lead enforcement efforts in new and difficult areas of the law, such as lending discrimination. In the coming years, one would hope and expect to see such new initiatives resulting in a expanded pattern and practice docket.

Finally, it is important to note that with the beginning of the second Clinton Administration will come personnel changes that will significantly affect both HUD and the Department of Justice. Both Assistant Secretary for Fair Housing and Equal Opportunity Elizabeth Julian and Paul Hancock, the Chief of the Housing and Civil Enforcement Section at the Department of Justice, have announced their departures. Assistant Attorney General for Civil Rights Deval Patrick has also announced that he is leaving the administration, and Andrew Cuomo has been selected to replace Henry Cisneros as Secretary of HUD. The success of federal fair housing enforcement efforts in the next term will hinge mightily on the performance of those selected to fill these positions.

Department of Housing and Urban Development

1. The new Secretary of HUD should immediately submit to Congress the overdue annual reports and should make the submission of timely reports in the future a priority.

2. The new Assistant Secretary of the Office of Fair Housing and Equal Opportunity should continue to audit carefully regional offices that report large numbers of over-age cases, high rates of administrative closure, low rates of successful conciliations, and low numbers of cause findings to determine if these offices have received proper training and are conducting competent investigations. The Assistant Secretary should make personnel changes as necessary to ensure greater consistency and quality of performance among the regions.

3. Based on the audit conducted in recommendation No. 2 above, the Assistant Secretary should initiate an education and outreach program in areas where complaint processing has been less effective to encourage victims of discrimination to continue to seek relief through the federal process.

4. In areas where the Fair Housing Act is vulnerable to attack by the industry and the Republican Congress, HUD should move quickly to issue guidance. Specifically, fair housing advocates and HUD should join forces to propose new regulations or other guidelines with respect to reasonable occupancy limits before new legislation is proposed by the Republican majority on Capitol Hill.

Department of Justice

1. The Housing Section should continue to monitor carefully the performance of U.S. Attorneys' offices around the country as they undertake primary responsibility for litigating election cases.

2. As the U.S. Attorneys' offices assume primary responsibility for prosecuting election cases, the Housing Section should reallocate staff and resources to permit the investigation and filing of new pattern and practice cases. In particular, the Section should build on the success of the testing program by expanding the type of testing performed and the number of states and cities where investigations are performed, and should continue its aggressive investigation and prosecution of lending and insurance cases. The Section should attempt to significantly increase the number of pattern and practices cases filed over the next two years.

3. The Section should redouble its efforts to work with the private sector and the non-profit community to identify issues, areas, and cases that would benefit from DOJ intervention. The increased flexibility that comes from the U.S. Attorneys' assistance with election cases should permit the Section to apply its resources selectively to prosecute impact cases that will benefit large numbers of victims of housing discrimination.

Endnotes

[1] Citizens' Commission on Civil Rights, *New Challenges*, Chapter XV, "Federal Fair Housing Enforcement: The Clinton Administration at Mid-Term," pp. 183-206 (1995)(hereinafter referred to as the "1995 Commission Report").

[2] *Id.* at 183.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 184.

[6] 42 U.S.C. § 3608(e)(2)(B)(i) - (iii).

[7] 1995 Commission Report at 186.

[8] Department of Housing and Urban Development, "Fair Housing Act Quarterly Trend Analysis (Year End FY 1995)" at 1, 6 (on file with the Washington Lawyers' Committee on Civil Rights and Urban Affairs) (hereinafter referred to as "HUD Quarterly Trend Analysis 1995"). Note that HUD's "Title VIII Quarterly Trend Analysis (FY 1994)" at 1 (on file with the Washington Lawyers' Committee for Civil Rights and Urban Affairs) (hereinafter referred to as "HUD Quarterly Trend Analysis 1994") contains slightly different statistics for new complaints than the HUD Quarterly Trend Analysis 1995.

[9] HUD Quarterly Trend Analysis 1995 at 1.

[10] HUD Quarterly Trend Analysis 1994 at 1.

[11] *See* testimony of John J. Knapp, General Counsel, U.S. Department of Housing and Urban Development, in *Issues in Housing Discrimination*, Vol. 2, at 107 (U.S. Commission on Civil Rights, November 13, 1987), cited in Citizens' Commission on Civil Rights, *One Nation, Indivisible: The Civil Rights Challenge for the 1990s*, p. 272 (1989)(hereinafter referred to as "1989 Commission Report").

[12] HUD Quarterly Trend Analysis 1995 at 4, 6.

[13] *Id.* at 6, 17.

[14] *Id.* at 4, 6.

[15] *See* HUD Quarterly Trend Analysis 1994 at 4, 13; HUD Quarterly Trend Analysis 1995 at 4, 17.

[16] HUD Quarterly Trend Analysis 1994 at 2.

[17] HUD Quarterly Trend Analysis 1995 at 2. Note, again, that the 1994 and 1995 HUD Quarterly Trend Analysis reports contain slightly different statistics for case closures in FY 1994.

[18] HUD Quarterly Trend Analysis 1995 at 2, 6.

[19] HUD Quarterly Trend Analysis 1994 at 3.

[20] HUD Quarterly Trend Analysis 1995 at 3.

[21] *Id.* at 4.

[22] *Id.* at 6, 21.

[23] *Id.*

[24] Region V-Mid-West (45%); Region VI-Southwest (52%); Region VIII-Rocky (46%); Region IX-Pacific/Hawaii (57%); HUD Quarterly Trend Analysis 1995 at 6.

[25] *Id.* at 5.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 11.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 22.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 3.

[40] *See above,* Section II(C)(1).

[41] The HUD Quarterly Trend Analysis, however, offers no explanation for the increase.

[42] *See* Schwemm, R., *Housing Discrimination* (1994 ed.) at Appendix E (listing outcomes of all HUD ALL decisions by type of case, number of victims, and amount and type of relief). For the purposes of this analysis, all cases decided in calendar year 1995 have been included.

[43] *Id.* (Numeric calculations by the author.)

[44] *Id.*

[45] 1995 Commission Report at p. 190.

[46] Schwemm at Appendix E. (Numeric calculations made by the author.); 1995 Commission Report at p. 190.

[47] Schwemm at Appendix E; 1995 Commission Report at p. 190. Note that the case was also brought on the basis of race.

[48] Schwemm at Appendix E.

[49] 1995 Commission Report at p. 190.

[50] Schwemm at Appendix E.

[51] *Id.*

[52] Information provided by Professor Robert Schwemm, University of Kentucky College of Law, by telephone conversation with the author December 16, 1996.

[53] Information provided by Professor Schwemm.

[54] Information provided by Professor Schwemm.

[55] Information provided by Professor Schwemm.

[56] Information provided by Professor Schwemm.

[57] Keating Memorandum, March 20, 1991 (on file with the Washington Lawyers' Committee for Civil Rights and Urban Affairs). The Keating Memorandum itself was issued to supersede a memorandum issued by Keating on February 21, 1991.

[58] Keating Memorandum at 2.

[59] *Id.* at 3-4.

[60] Memorandum from Nelson A. Diaz, July 12, 1995, (hereinafter "Diaz Memorandum")(on file with the Washington Lawyers' Committee for Civil Rights and Urban Affairs).

[61] Diaz Memorandum at 1.

[62] Memorandum from Elizabeth K. Julian, Acting Deputy Assistant Secretary for Policy and Initiatives, September 25, 1995 (on file with the Washington Lawyers' Committee for Civil Rights and Urban Affairs).

[63] Statement of Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity, Septermber 2, 1994 (on file with the Washington Lawyers' Committee for Civil Rights and Urban Affairs).

[64] Letter of October 2, 1996 from Assistant Secretary Elizabeth Julian to Jill Levine (on file with the Washington Lawyers' Committee for Civil Rights and Urban Affairs).

[65] 42 U.S.C. § 3607.

[66] 42 U.S.C. §§ 3614(a), 3612(o).

[67] 1995 Commission Report at 194.

[68] *Id.*

[69] Information provided by the Department of Justice upon request by the Washington Lawyers' Committee for Civil Rights and Urban Affairs.

[70] Information provided by the Department of Justice.

[71] Information provided by the Department of Justice.

[72] Information provided by the Department of Justice.

[73] Department of Justice Fair Housing Act Case Docket, supplied by the Department of Justice upon request (hereinafter referred to as "DOJ Case Docket") (on file with the Washington Lawyers' Committee for Civil Rights and Urban Affairs). All numeric calculations from the DOJ Case Docket were made by the author.

[74] DOJ Case Docket.

[75] *Id.*

[76] 1995 Commission Report at 194-195.

[77] *Id.* at 195.

[78] *Id.*

[79] DOJ Case Docket.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* Prior Commission Reports have attempted to provide an average recovery per victim by protected category. Currently available data from the Department does not allow for such a calculation because the data does not specify the number of victims compensated in each case. While victim fund cases make collecting this data somewhat more complicated than in the past, it would be helpful to have such data available to the public.

[85] Department of Justice Testing Case Docket (hereinafter "DOJ Testing Case Docket") (information on file with the Washington Lawyers' Committee for Civil Rights and Urban Affairs).

[86] DOJ Testing Case Docket.

[87] *Id.* (Numeric calculations by the author.)

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.; U.S. v. Park Woods Apartments* ($475,000); *U.S. v. Kendall House* ($1 million).

Chapter XVIII

Minority Access to Higher Education

by Reginald Wilson, Ph.D.

Introduction

The Clinton Administration has completed its first term and, with a four-year track record on display, it is easier than at mid-term to evaluate the policies and actions that have had an effect on minority access to higher education. Moreover, not only do we have a clear picture of what effect these policies have had, but there are hints at what their future impact may mean.

This paper will recapitulate briefly the first two years, describe what happened to the policy initiatives begun by the Clinton Administration, relate how the introduction of an aggressively oppositional Congress changed the direction of those policies, and describe Administration policies of the latter two years and the effect they have had on minorities.

At the end of the first two years, it was evident that the Administration's higher education policy was not clear, and that some of the policies that were articulated had been thwarted in implementation. Race-based scholarships were problematic; recommendations for high education funding seemed to go contrary to minority needs; racial issues were exacerbated by the *Podberesky* decision; and the reauthorization of the Higher Education Act loomed on the horizon for the next year. All of these issues have consequences for minority access to higher education specifically, and for civil rights gains and losses in general.

This paper will concentrate on the following topics: the fluctuations of college participation and graduate school rates for minorities; the educational funding of minority student aid; the actions of the Board of Regents of the University of California; and the Supreme Court's rulings on affirmative action.

I. Statistical Trends

A. High School Completion Rates

In the Fourteenth Annual Status Report of the American Council on Education, Robert Atwell, president of the Council stated, "substantial progress has been made in recent years in advancing minority participation and success. Nevertheless, the picture is decidedly mixed for different groups."[1] As reported by the Council, high school completion rates increased for African Americans; indeed, the rate of African American women equaled that of white men (80.0% vs. 80.7%). African American men also had an increase but of more modest proportions (73.8% to 73.7%). Since high school completion as reported by the Census Bureau includes both graduates and General Education Development (GED) completers, disaggregated data is needed to determine the proportion in each category.

The rate for Hispanic men and women took an unexpected drop in high school completion (60.9% to 56.6%) and in college enrollment (35.5% to 33.2%), reminding us that Hispanic success in high school and in college is extremely volatile and very sensitive to vagaries in the economy, the cost of tuition, and the political climate.[2]

It is necessary once again to apologize for the lack of accurate high school completion and college enrollment figures for Asians and Native Americans.

The Census Bureau does not collect these figures citing the small size of the population. But considering the rapid growth of those populations, particularly the Asian population, that excuse may no longer suffice. In any event, it is estimated that Asian high school completion is greater than other minority groups, while Native American rates are the lowest.

B. College Participation Rates

The number of white males in college took a slight drop (42.0% to 41.7%) while the number of white females showed a slight increase (41.3% to 43.7%). But among African Americans, numbers for both groups increased. As stated, Hispanics showed a drop for both men and women in college attendance. It must also be remembered that 43% of the African American students and 56% of the Hispanics are in the community colleges (contrasted with 36% of white students), from which their transfer rate is the lowest.[3]

As compared to two years ago, African American men and women improved their college participation rate and, in the process, surpassed Hispanics who declined in both men's and women's participation. The minority groups (except Asian) continue to lag behind the white group in college participation but, for African Americans at least, the gap is narrowing due to slow but steady progress.

President Clinton's offer of a Hope Scholarship, that is, a $1,500 per year tuition tax credit "to help all high school graduates attend two years of college," may resonate positively with minorities at first, for whom the increasing loan burden has proven to be onerous.[4] But as discussed later in this paper, critics of these scholarships are less enthusiastic.

By 1994, all minority groups combined had attained a record college enrollment, despite taking on greater loan burdens. Graduation rates had increased modestly as well since 1991. The rate for whites was 59% (up 3 points from 1991). The rate for African Americans took a sizable jump from 31% to 38%, which is very encouraging. The rate for American Indians took the greatest jump (from 29-37%) but started from a depressingly low base. Asians (62-65%) and Hispanics (40-45%) experienced a more modest increase, but they were already the first and third highest graduation rates.[5]

Although the picture is mixed, it is generally encouraging and has shown a steady improvement, with a few exceptions. Minorities, with the help of affirmative action, targeted scholarships and increased university support programs are gradually narrowing some of the gaps between themselves and their more fortunate white peers. But, as discussed later in this paper, these improvements may be set back by recent court decisions and state actions.

C. Degrees Conferred

Although African American associate degrees dipped somewhat earlier in the decade, since 1992 they have recovered and in 1993 reached a peak of 42,340. But it was the explosive growth of female degrees at a 24% change that made the greatest contribution to the African American total.[6] In similar fashion, the female contribution in each racial group accounted for the substantial difference in degrees attained, with females receiving the majority of degrees awarded in every group.

Likewise, with bachelor's degrees, women were the majority of the recipients in every racial group. But here again we note the need for disaggregated data. There are differential rates for Cubans, Puerto Ricans, and Mexican Americans, who are all called "Hispanic." And there are differential rates for Chinese, Japanese, Filipinos, East Indians, Laotians, and Vietnamese, all of whom are lumped together as "Asian."

The superior numbers of women continue into graduate school where women dominate in masters degrees awarded and in doctoral degrees (except for Asians in each category).[7] Only when we disaggregate the graduate fields of study, do we see that men still dominate the fields of study that are most rewarded and prestigious — *i.e.,* engineering, physical science, and business.

The degrees awarded to women are nearly twice as great as that for men in graduate school. While not quite as dramatic, they are superior for women in other groups as well. Only in professional school do men continue to hold an advantage over women (with the exception of African Americans). It is evident that aggressive measures will continue to have to be made to get African American men into graduate school, because the dramatic differential for women in this group is due primarily to the relative stagnation of male degree seekers.

Nevertheless, women have made dramatic progress in some traditionally male fields.

Percentage of Female Representation

	1974	1994
Law	7	25
Accounting	24	52
Medicine	8	19

Source: U.S. Bureau of Labor Statistics, 1995

The role of affirmative action in these fields cannot be denied. This point has been dramatically shown particularly recently in the overwhelmingly male-dominated field of medicine; at this rate of progress, medicine may soon be a female-dominated field.

Female Medical School Applicants, Enrollees, and Graduates by Year of Matriculation

	1969-70	1993-94
Applicants	9%	42%
Enrollees	9%	40%
Graduates	8%	38%

Source: Employment and Earnings, 1995

Longitudinal research done by Price and Associates confirmed that "GPA and performance on standardized tests has not been shown to have a predictive relationship with long-term measures of performance or career success in medicine."[8] This corroborates the view that measures of affirmative action must take into account broad qualitative measures of women and minorities — such as leadership and community service — in attempting to assess their aptitude for the study of medicine as well as for numerous other fields.

Efforts at increasing the representation of minorities in graduate school must continue since minorities represent only 8% of the doctorates awarded by U.S. universities, up from 7% in 1992. Non-U.S. citizens accounted for 32% of the doctorates given by American universities in 1994 (up from 19% in 1984). Non-citizens continue to get a greater percentage of their financial aid in grants as compared to domestic minorities.[9]

There is still much progress to be made. Greater efforts must be made to impress universities with the economic advantages in educating American citizens, and to make them aware of the need to broaden their net in searching for students with the capability of pursuing doctoral work. One of the most significant things universities can do is to ease the financial burden on minority doctoral students, which is found to be the greatest impediment to going into and successfully completing doctoral work.

II. Higher Education Funding

Funding for higher education was caught in election year politics and came out a substantial winner. President Clinton presented himself as the "education president" and found it necessary to stress some education themes in his re-election campaign. The Republican Congress, afraid that their apparently anti-education policies could provoke another embarrassing government shutdown just weeks before the November elections, gave more than even the Democrats previously proposed in their funding request.[10] Both political parties rushed to take credit for the final package, with President Clinton calling the Pell grant raise the largest in two decades and Rep. Randy Cunningham (R-Calif.) proclaiming, "We've increased education spending off the board."[11] As a consequence, higher education funding did remarkably well in a year of bitter ideological struggle between political philosophies.

Here is the breakdown of the negotiated agreement:

- Pell Grants: Raised to $2,700, a figure that is $200 more than the House recommended and $100 more than proposed by the Senate.

- Work-study: Was increased 34%. Its $830 million funding exceeds the 1996 appropriation by $213 million. This is a giant step toward meeting the goal of $1 billion by the year 2000.
- Perkins Loans: Increased to $158 million, $90 million more than a Senate proposal and the same as the White House request.
- TRIO: Funding at $500 million, up $37 million from 1996.
- State Student Incentive Grants: Funded at $50 million. The program was originally scheduled for termination by the House and funding of $13 million was first recommended by the Senate.
- Howard University: Was funded at $196 million, up $14 million from the 1996 appropriation but the same as the White House request.[12]

Some programs important to students of color did not receive funding increases for 1997, however. For example, historically black colleges and universities (HBCUs) received level funding of $108.9 million. Congress also left HBCU graduate schools at $19.6 million, the same as for 1996. Hispanic-serving institutions received a slight increase of $2 million, but this was because of an Agriculture Department appropriation, not because of any increase in the Education Department funding.[13]

With education one of the themes of President Clinton's re-election campaign, higher education has fared fairly well. Mr. Clinton said in California that he liked to talk to "solid middle-class citizens, leading the lives we all assumed we would lead when we were children ... [but concerned now about] can I raise a successful family and have a good career?"[14] This message resonates well with the middle class.

Another main theme of the Clinton campaign rhetoric, calculated to appeal directly to his lower- and middle-class supporters, was his proposal of Hope Scholarships to allow a deduction of $10,000 in tuition from one's taxable income or take a tax credit of $1,500 for the first year of undergraduate education, which is renewable for the second year if the student maintained a B average. President Clinton motivated the plan this way: "Let's make education our highest priority so that every 8-year old will be able to read, every 12-year old can log onto the Internet, every 18-year old can go to college."[15]

This plan, while widely popular with the voters, does have its critics. Lawrence Gladieux, executive director for policy analysis at The College Board, and Robert Reischauer, a senior fellow in economic studies at the Brookings Institution, in an Op Ed piece in the Washington Post raised four pointed questions which they thought citizens should demand the answers to before accepting the plan: (1) Will tuition tax credits boost enrollment? (They don't think so, as the plan seems mainly to be a windfall for the middle class whose children were going to college anyway); (2) Would the plan lead to federal instrusion into higher education? (They think that the plan creates a greater role for the Internal Revenue Service); (3) Will the program encourage higher tuition and grade inflation? (They believe both tuition and grades will spiral); and (4) Is the $40 billion for this initiative the best investment? (They think not, preferring instead to add the dollars to need-based financial aid).[16]

Even if one discards the third question (the same things were said about the GI Bill), this leaves some very hard questions for President Clinton's plan to answer. In the final analysis, even though the President is clearer about his higher education priorities and his funding priorities have emerged relatively unscathed, nonetheless, his major new funding strategies are aimed unapologetically at the middle class (his strongest supporters) and not at the lower and working class where the need is the greatest. Indeed, the President's signing of the welfare bill, "to end welfare as we know it," leaving no federal safety net for the poor, is said by some analysts to leave the poor even more desperate than they were before.[17]

III. The Board of Regents of the University of California

Governor Pete Wilson of California tried to make opposition to affirmative action the centerpiece of his primary campaign for president.[18] When his campaign fizzled, affirmative action diminished slightly as a national issue but it remains in the headlines as a bitter California ballot issue whose ripple effect will affect other states, now that it has won.

But despite the growing opposition to affirmative action politically and in the general population, there is nearly as much support for it among prominent Republicans as among Democrats. For example, such Republican spokesmen as Los Angeles Mayor Richard Riordan, New Jersey Governor Christine Todd Whitman, General Colin L. Powell, Massachusetts Governor William Weld, and Ohio Governor George V. Voinovich all support some form of affirmative action.[19] "The reality is that the majority of the recipients of affirmative action are [white] women" said Karen Miller, director and executive branch liaison for the Conservative Heritage Foundation. "As a result, I think [Republicans] want to be cautious on how they approach the issue."[20]

Yet, Governor Wilson has pressed full steam ahead in his efforts to end all affirmative action in the University of California. Since the Regents are appointed by the governor, and the governor is an ex-officio member of the board, Wilson was able to get a measure passed which said in part, "The University of California shall not use race, religion, sex, color, ethnicity, or national origin as criteria for admission to the University or to any program of study."[21] This measure, Resolution SP-1, goes into effect in the spring of 1997.

SP-1 caused an uproar among the students and staff because academic matters normally are delegated by the board to the Academic Senate. In addition, the presidents of the University of California system unanimously opposed the resolution as did the majority of the presidents of the California State University system.

The resolution responded to an Executive Order issued by the governor to "End Preferential Treatment and to Promote Individual Opportunity Based on Merit."[22] The resolution and the executive order dramatically limit affirmative action in the state. And they are compounded by a ballot initiative called Proposition 209, "The California Civil Rights Initiative" (CCRI), which, contrary to the name, will eliminate all public sector affirmative action in the state. There is a great deal of controversy over this measure between supporters and opponents of the CCRI ballot initiative now that it has passed.

Residents of California are undoubtedly expressing their fear of the wave of immigrants crossing their borders from the South (Hispanics) and coming through their ports (Asians). But denying immigrants equal access to jobs and entry to the university will only exacerbate the economic problems of the state rather than relieve them. In addition, the governor is supposed to lead and enlighten the state instead of playing on their fears for political advantage. In any event, the consequences of what happened in California will undoubtedly influence what happens in other states.

An initial simulation using only GPA and test scores gives some hint as to the devastating consequences of the Regents' resolution:

Effect of Using Only GPA and Test Scores on Admissions in California

African American	50%	Loss
Hispanic	15%	Loss
Indian	50%	Loss
White	3%	Gain
Asian	15%	Gain

Source: University of California Study, July 15, 1995

No doubt the University is studying other methods which will soften the blow including: targeting high schools with low representation at the university; concentrating on pre-college programs; and redefining University of California eligibility to include the top 12.5% of each high school (rather than of all high schools). There are other ways being explored and it remains to be seen what affect they will have.

IV. Recent Supreme Court Decisions

There are two appeals court decisions and two Supreme Court decisions that will profoundly affect admission of minorities and women to universities using affirmative action. The two Supreme Court decisions discussed below are *University of California Regents v. Bakke* (1978) and *United States v. Fordice* (1992). The appeals court cases are *Hopwood v. Texas* (5th Circuit, 1996) and *Podberesky v. Kirwan* (4th Circuit, 1994).

Bakke has been the law of the land since 1978. Justice Powell, writing for the majority, declared quotas to be illegal in medical school admissions but also found race could legitimately be used as one factor in an admissions decision. But in *Hopwood*, two appellate court justices not only declared the University of Texas Law School racially based admissions policy unconstitutional, but said Justice Powell's opinion in *Bakke* was irrelevant. Indeed, they declared "[race] is no more rational in its own terms than would be choices based upon the physical size or blood type of applicants."[23] Since the Supreme Court refused to review *Hopwood*, this decision is only applicable in the states which make up the Fifth Circuit: Texas, Louisiana, and Mississippi.

For Mississippi in particular, this decision creates confusion and contradictions, for while the judges in *Hopwood* found the use of race to be "irrational," a higher education desegregation decision also applicable to the state, *United States v. Fordice*, requires the state to take race into consideration.

Finally, in *Podberesky*, the appellate judges found the awarding of race-based scholarships to be unconstitutional despite the voluminous proof offered by the state of Maryland that it had discriminated in the past and that offering the scholarships in question to African Americans was a way of correcting that past. However, the judges were unconvinced. The Supreme Court also refused to review this decision, so it too applies only in the circuit in which it was decided: Maryland, the two Virginias, and the two Carolinas.

But, as an indication of how a restricted decision like *Podberesky* can affect other parts of the country, the attorney general of Colorado, immediately after the decision was announced, said "Although the decision is binding only in the Fourth Circuit, we believe that it would be extremely persuasive authority in any case decided elsewhere in the country."[24]

One can see that these decisions raise many more questions than they answer. The Supreme Court will be required to weed out the complexities and the contradictions and the universities, meanwhile, will be left in a quandary trying to sort out what is and what is not allowed.

Conclusions and Recommendations

The President has gotten a clear mandate to take the lead in setting education policy for the next four years. He has gained a clear victory and many of his mistaken policies of the past, like the (SPREs), have been dropped. He declared his priority was on education during the campaign and it remains to be seen how this will become operational. As one example, while Hope Scholarships are offered as an indication of his direction, student aid experts say "the president's plan… would mainly help middle income families, which, aided by student loans are already sending their children to college in record numbers."[25]

But two obstacles remain in the President's path in carrying out his plans: a Republican Congress and a conservative Supreme Court. The Republican Congress will undoubtedly be more subdued than when it first took over in 1994 because of the embarrassment of two government shutdowns, but it will still be persuaded to cut federal spending and balance the budget as its two top priorities.

Some members of the Supreme Court seem bent on restricting affirmative action to only strictly proven discrimination with a specific remedy tied to temporarily fixing that discrimination. This is a blow to minority access and will set back the gains of recent years both in student admissions and in faculty hiring.

The Administration will have to be more cautious and less ambitious in its projections for the future and should go after what can reasonably be achieved. Perhaps the Administration can be persuaded to focus more on the poor in these next four years, as they need much more help from the federal government, while not having many friends in Congress or in the courts. The Administration might begin with trying to modify the welfare bill to make it less onerous and consider folding the Hope Scholarships into increasing the Pell grant amount. Moreover, the Administration can help colleges and universities figure out creative ways to meet new restrictions on affirmative action and stay the course on their commitment to diversity.

In any event, despite the President's seeming sympathy to the issue, the next four years do not bode particularly well for minority access to higher education.

Endnotes

[1] Carter, Deborah J. and Reginald Wilson. *Minorities in Higher Education: Fourteenth Annual Status Report.* Washington, D.C.: American Council on Education. Copyright, 1996 [hereinafter 1996-96 Status Report], p.2.

[2] *Ibid*, p. 55.

[3] *Ibid.*, p. 60.

[4] Wolf, Richard. "Dole, Clinton Courting Votes with Education Proposals." *USA Today,* September 25, 1996, p. 5D.

[5] Carter and Wilson. *1995-96 Status Report,* Op. Cit., p. 60.

[6] *Ibid.*, p. 64.

[7] *Ibid.*, p. 78.

[8] Price, P. B., *et al.* "Measurement of Physician's Performance." *Journal of Medical Education,* 1964, Vol. 39, pp. 302-311.

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[11] *Ibid.*, p. 5.

[12] *Ibid.*, p. 6.

[13] *Ibid.*, p. 6.

[14] "Changing Rhetoric, Clinton Hopes to Shore Up Middle-Class Support." *The Washington Post,* October 28, 1996, p. A10.

[15] *Ibid.*, p. A10.

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[18] Fletcher, Michael. "Losing Its Preference: Affirmative Action Fades as Issue." *The Washington Post,* September 18, 1996, p. A12.

[19] *Ibid.*, p. A12.

[20] *Ibid.*, p. A12.

[21] Resolution SP-1, adopted by the Regents of the University of California, July 20, 1995.

[22] Executive Order W-124-95, June 1995.

[23] *Hopwood v. Texas* (5th Circuit, 1996)

[24] Dyl, Antony B. "Race-based Scholarships." State of Colorado, Department of Law, Office of the Attorney General, June 15, 1995.

[25] "Some Educators Fear the Democratic Party has Abandoned Low-Income Students." *The Chronicle of Higher Education,* October 18, 1996, Vol. XLIII, No. 8, p. A27.

Chapter XIX

Many Rivers to Cross: Gender Equity in the Clinton Administration

by Verna L. Williams

[A]ggressiveness and the fear of failure are not the incentives that propel women to want to succeed and to achieve success to the same extent as males ... [W]omen basically do not have the same threshold on emotion as men do ... They break down emotionally.[1]

These outmoded notions of women formed much of the precarious foundation supporting the Virginia Military Institute's exclusion of women. These "expert" opinions, articulated not in the 1830s, when VMI was founded, but during litigation in the 1990s, demonstrate the intransigence of sexism and its power to constrict educational opportunities for women. As the Citizens' Commission's 1995 report illustrated, sex discrimination persists in education, much of it based on stereotypic ideas such as those above. Outright exclusionary practices, such as those of VMI, or other barriers, such as sexual or gender-based harassment, among others, keep equality in educational opportunities out of reach for far too many women and girls. As a result, despite the fact that many women have increased their numbers in postsecondary education, for example, many more lag behind their male counterparts, and reap the diminished economic benefits demonstrated so clearly by the persistent wage gap. Even with the availability of tools such as Title IX of the Education Amendments of 1972 or the Women's Educational Equity Act, gender equity in education remains a goal that has yet to be attained.

As the first term of the Clinton Administration draws to an end and we approach the second term, the question of progress in this critical area looms large. While the Administration has taken important steps to advance gender equity — challenging, for example, VMI's discriminatory policies and urging the adoption of strict scrutiny for gender-based discrimination — other concrete actions are necessary to eradicate the impediments to education for girls and women. This paper examines the Clinton Administration's attempts to address sex discrimination in education and makes recommendations to strengthen those efforts for the second term.

I. Department of Justice

Focusing on eliminating state practices banning women from educational opportunities, the Department of Justice successfully challenged all-male admissions policies of the Virginia Military Institute (VMI) and the Citadel,[2] two prestigious public institutions. Significantly, in seeking to open VMI's doors to women, the Administration also sought to accord sex-based distinctions the same level of exacting constitutional scrutiny to which race-based distinctions are subjected.

VMI had excluded women for almost 160 years from its mission to create "citizen-soldiers." This policy had endured well after all the nation's military academies admitted women, based on the institution's belief that its mission and its "adversative" training techniques were unsuitable for women. The Department of Justice, which received a complaint from a young woman seeking admission to VMI, sued the Commonwealth of Virginia, alleging that VMI's policy violated the Equal Protection Clause of the Fourteenth Amendment. A district court found that

VMI's policy was not unconstitutional, which the Fourth Circuit Court of Appeals reversed in 1992. Notably, however, the circuit court permitted the state to propose a plan to remedy the constitutional violation, which could include admitting women to VMI, becoming a private institution, or creating a separate "parallel" program for women to receive a VMI-type education. In response, the state established the Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College, a private college for women. However, VWIL did not provide the same adversative training that was available at VMI. Moreover, it lacked the rigorous military training, variety of course offerings, faculty credentials, funding base, and considerable prestige that VMI afforded. Nevertheless, both the district and appeals courts found that VWIL provided women with a constitutionally acceptable alternative to VMI, concluding that "if VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife," but in the end "both will have arrived at the same destination."[3]

The Supreme Court disagreed, holding that VMI's policy was unconstitutional and that creation of VWIL did not cure the constitutional violation. (*United States v. Virginia*, 116 S.Ct. 2264 (1996).) The Court found that Virginia could not provide an "exceedingly persuasive justification" for excluding women. Significantly, the Court noted, Virginia's rationale for reserving this opportunity for men was based on stereotypic notions about women. (*Id.* at 2280.) Additionally, the Court found that VWIL was a "pale shadow of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence." (*Id.* at 2285.) By challenging VMI, the Department of Justice opened up a new educational opportunity for young women, without jeopardizing other opportunities for single-sex education that are designed to remedy long-standing discrimination against women. (*See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729 - 730 (1982); 34 C.F.R. § 106.3 (1994).)

In addition to confronting this discriminatory practice, the Department of Justice sought strict scrutiny for gender-based distinctions, a step never taken before. To date, strict scrutiny has been applied only to distinctions based on race; however, the Department argued that this exacting standard of review was appropriate for state actions based on gender because "sex, like race, is an immutable and highly visible characteristic that 'frequently bears no relation to ability to perform or contribute to society.'"[4] Although the Supreme Court did not decide this question, Justice Ginsburg, writing for the majority, described the standard in terms that suggested that the Court had applied a heightened constitutional standard, stating repeatedly that an "exceedingly persuasive justification" was necessary for state-imposed gender distinctions to be deemed constitutional, and referring to this standard as "skeptical" scrutiny. (116 S.Ct. at 2274.) Thus, the Department of Justice's efforts to subject gender-based distinctions to a heightened level of scrutiny was in some form successful and may lead to strict scrutiny for such distinctions in the future.

We commend the Department of Justice for challenging VMI and for seeking strict scrutiny for state imposed classifications based on sex. However, as the Commission noted in its 1991 report, the Department should expand its enforcement role in this area. Specifically, the Department of Justice should develop a litigation plan to address gender equity in education, which should include efforts to work collaboratively with the Department of Education's Office for Civil Rights. In addition, the Department of Justice should use its coordination and review authority to issue a policy statement incorporating the Supreme Court's decision in ***Franklin v. Gwinnett County Public Schools***, which held that institutions can be liable for damages for violations of Title IX, a holding that applies equally to Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act, and the Age Discrimination Act. In this capacity, the Department should put recipients on notice that violations of the civil rights laws subjects them not only to defunding proceedings, but also damages.

II. Office for Civil Rights

> *Our mission is to ensure equal access to education and to promote educational excellence throughout the Nation through vigorous enforcement of civil rights.*[5]

With these forceful words, the Office for Civil Rights (OCR) of the Department of Education articulated its commitment to eliminating the discriminatory barriers to educational opportunity. An examination of the Administration's efforts to secure gender equity underscores that although major steps have been taken, much progress must be made in order for that pledge to become a reality.

The Administration's ability to fulfill this promise largely is affected by the resources available for civil rights enforcement. Since 1994, OCR's resources have dwindled significantly. Specifically, OCR's appropriation for FY 1997 is 30% less than that for FY 1994. Similarly, staffing levels for OCR have decreased steadily, with OCR having a ceiling of 833 full-time equivalent (FTE) positions for FY 1995. Actual FTE usage for that year was much lower at 788, which is comparable to OCR's staffing rate for FY 1989.[6]

With these diminished resources, OCR resolved approximately 5,500 complaints and 178 compliance reviews in FY 1995.[7] The majority of those enforcement actions concerned discrimination based on disability and race or national origin, respectively. Only 7% of the complaints received by OCR in FY 1995 alleged sex discrimination.[8] And the number of compliance reviews involving sex discrimination has decreased steadily from 35 in 1994, to only four in 1996.[9] It appears that the diminution of funding to OCR has translated into a significant decrease in resources targeting gender bias in education.

But resources are not the entire story. With respect to policies and enforcement actions focusing on sex discrimination in education, OCR's record is at once deserving of praise, but in need of improvement. OCR has risen to the challenge presented by a hostile Congress to reaffirm strong enforcement of gender equity in athletics. In addition, OCR has issued strong and helpful guidance regarding sexual harassment, but did so in piecemeal fashion after an unnecessarily protracted process. It resolved a complaint concerning gender bias in a major nationwide scholarship program based on a discriminatory test, but without providing for substantive monitoring to ensure that the complained of inequities are addressed in an efficient manner. OCR's record in this area demonstrates that for the next term, it must resolve to engage in the strong and comprehensive efforts necessary to ensure that the civil rights laws guaranteeing gender equity in education are enforced vigorously.

A. Athletics

The increasing enforcement of Title IX's mandate in the athletic arena came under attack during the second half of the Clinton term. The 104th Congress challenged OCR's enforcement in athletics, based on the misperception that creation of equal opportunity in athletics programming was coming at the expense of men's sports. Specifically, the House Budget Committee voted to require OCR to clarify its policy with respect to enforcement in this area before it would allow the Department of Education to spend any funds to enforce Title IX in athletics. Although this restriction was never adopted by the Senate, and so was never enacted into law, OCR responded appropriately to the House action.

The House action was based on the Committee's misconception that OCR gives "undue" weight to the "proportionality" test. Under that test, schools are considered in compliance with Title IX if they offer athletic opportunities to male and female students in proportion to their respective enrollments. However, the proportionality test is only one of three tests used to determine whether schools comply with Title IX in this area. The second test focuses on whether a school has a history and continuing practice of expanding programs for the underrepresented sex. The third test looks to whether the athletic interests and abilities of the underrepresented sex have been fully and effectively accommodated by the school. A school that satisfies just one of these three tests will be found in compliance with Title IX.

In January of 1996, OCR issued a policy guidance clarifying the obligations of educational institutions in the area of athletic participation opportunities under Title IX. OCR's policy guidance reaffirms the principle that complying with only one prong is sufficient to comply with Title IX. In addition, the guidance explains how institutions may comply with prongs two and three of the test, providing specific examples to demonstrate how institutions may meet those standards and clarifying the factors OCR considers in determining unmet interest and ability on the part of the underrepresented sex under prong three. Significantly, OCR's policy guidance did not retreat from the principles it established in its 1979 Policy Interpretation, which first established this three-part test for determining compliance, or from its past enforcement actions that have expanded athletic opportunities for girls and women.

B. Sexual Harassment

In a major development, the Office for Civil Rights issued draft policy guidances on sexual harassment at the end of the Clinton term, after a three-year-long process. While the pace of the Department's actions fell far short of the recommendation in the 1995 report to expedite publication of this much needed policy guidance, the draft policy emerging from OCR provides a welcome statement of the legal principles that form the basis for OCR's enforcement actions in this area.

OCR began the process for developing policy guidance on sexual harassment in education during the fall of 1993. The year before, the Supreme Court in *Franklin v. Gwinnett County Public Schools* [530 U.S. 60 (1992)] ruled that sexual harassment was a violation of Title IX and that schools could be liable for damages for failing to take prompt remedial action designed to end it. In light of this major development, guidance from OCR was critically necessary to inform recipients of federal funds of their obligations under Title IX, and to inform students of their rights under the law. By the fall of 1993, OCR indicated that it planned to provide such guidance and it convened "focus groups" of interested stakeholder groups, including educators and advocates, to discuss various procedural and substantive issues regarding the policy.

Organizations participating in the focus groups urged OCR to move quickly in this area. Schools and educators around the country wanted guidance about their duties. In addition, the first sexual harassment cases were winding their way through courts. No guidance was forthcoming from OCR, however, other than that available from certain letters of finding, which sometimes were accorded deference, and sometimes were not. Significantly, in April of 1996, while OCR still was drafting the policy, the Fifth Circuit Court of Appeals in *Rowinsky v. Bryan Independent School District*, 80 F.3d 1003 (5th Cir. 1996), explicitly refused to defer to OCR's letters of findings, ruling that Title IX did not encompass student-to-student sexual harassment. Taking a narrow reading of Title IX that is unsupported by the statute, its legislative history, and the relevant Supreme Court precedent, the Fifth Circuit concluded that Title IX only applies to the actions of recipients, and, since students are not agents of schools, their actions cannot be the basis of liability. The court further rejected OCR letters of findings that correctly articulate that the standard of liability is based on the recipient's own actions in turning a blind eye to the harassment, remarking that OCR had "left unresolved the issue of peer sexual harassment," (*id.* at 1005); instead, the court relied on a 1981 internal policy memorandum. The plaintiffs in *Rowinsky* sought review by the Supreme Court, supported by amicus briefs filed by the National Women's Law Center and NOW Legal Defense and Education Fund on behalf of women's and civil rights groups and the Department of Justice on behalf of OCR; however, the Court denied *certiorari*. As a result, unfortunately, OCR is bound by the Fifth Circuit's decision in that jurisdiction, which is inconsistent with the view long articulated in its letters of finding and, at long last, in its policy guidance.

When OCR finally issued its policy on sexual harassment, the substance of the policy was strong and helpful, but the format was problematic. OCR first released guidance on peer hostile environment sexual harassment on August 14, 1996, as an attachment to a "Dear Colleague" letter. The policy states clearly that Title IX prohibits student-to-student harassment and that schools face liability for such misconduct when they knowingly fail to take appropriate action to remedy it. Almost two months later, OCR issued policy guidance regarding employee-student sexual harassment on October 4, 1996. This policy guidance follows the Supreme Court's decision in *Meritor Savings Bank v. Vinson* [477 U.S. 57 (1986)] stating that school liability for this form of harassment should be determined by agency principles, thus signaling OCR's intention that schools not be held strictly liable for sexually hostile environments created by their employees.

To date, however, the policies have not been combined into one comprehensive document, although OCR has stated its intention to do so. We urge OCR to combine the policies to eliminate confusion that will surely arise either through unnecessary repetition of applicable principles or the omission of important matters. More importantly, however, we urge OCR to issue the final comprehensive policy on sexual harassment without any further delay. The process has been unduly protracted, to the detriment of civil rights enforcement.

C. Testing

In another protracted proceeding, OCR finally resolved a complaint filed by FairTest and the ACLU Women's Rights Project challenging the use of the Preliminary Scholastic Assessment Test (PSAT) as the sole determinant of eligibility for the National Merit Scholarship. FairTest and the ACLU alleged in a complaint filed in 1994 that since 1986, girls comprise 55% of students taking the test, but only 36% of those qualifying as semi-finalists for National Merit Scholarships.

As noted in the Commission's 1995 report, standardized testing presents many barriers for young women's access to educational opportunities. Girls and young women outperform their male counterparts in school, but consistently score below them in standardized tests. In addition, the test scores do not accurately predict future performance in college. Indeed, OCR indicated that addressing the inequities in testing was one of its top priorities. However, just as in the case of the sexual harassment policy guidance, OCR engaged in a lengthy process that yielded mixed results for gender equity.

Two years after the FairTest/ACLU complaint was filed, OCR entered into a resolution agreement with the College Entrance Examination Board (College Board) and the Educational Testing Service (ETS) to add a test of written English to the PSAT beginning in October 1997. The College Board and ETS also committed to studying the feasibility of using other criteria such as grades in ascertaining scholarship eligibility. FairTest and the ACLU have voiced their concern about the terms of the agreement, noting first that addition of the test of written English may have a disparate impact on students of color and therefore will not address the underlying problem of relying on a test that inaccurately predicts academic capabilities to determine scholarship eligibility. In addition, the agreement does not articulate the results that will indicate that the test is an accurate and fair instrument for its stated purpose. Moreover, the study of new criteria for determining scholarship eligibility was not included in the resolution agreement. As a result, the College Board and ETS are not required to complete the study by a date certain or to expedite the study in the event that disparities persist despite the new addition to the PSAT. We recommend that OCR closely monitor this case and make development of a policy statement concerning non-discriminatory testing of students a priority. Given the reliance of more schools on standardized tests, such as the Scholastic Assessment Test, and the continued attacks on affirmative action in higher education, such a policy statement is necessary to ensure that women and students of color are not unfairly denied an opportunity to attain a postsecondary education.

D. Data Collection

For almost 30 years, OCR has collected important civil rights data from school districts and individual schools that has enabled the agency and advocates across the country to monitor compliance with the civil rights laws of the nation. At this writing, OCR has decided to postpone this important activity in order to redesign the survey instruments.

Every two years, OCR collects data using the Elementary and Secondary Education Civil Rights Survey. Because the method of collection apparently does not take advantage of the latest computer technology, analysis of this data can take up to two years, which means that the important information gathered is not easily accessible for advocates or OCR. Seeking to address this issue, OCR decided to redesign the survey and to postpone data collection until retooling of the instrument is complete. Given the delay that has characterized other OCR actions in major areas, civil rights organizations are greatly concerned about the cessation of data collection pending completion of a process that very likely will take longer than OCR has anticipated. The data collected is too crucial to civil rights enforcement efforts to be postponed indefinitely.

Data from the Elementary and Secondary Civil Rights Survey has been used to identify, remedy, and prevent discrimination. It is critical to monitoring school desegregation. Parents and community advocates look to the data to fight for quality education for students that have been underserved by local school systems. Educators also use the data collected by OCR to remedy their schools' problems achieving equity. Simply put, the data collected by OCR is an important tool for assuring students of equity in education.

Recognizing the need to revamp the data collection, we nevertheless recommend that OCR continue to gather data this year as originally scheduled. In addition, with regard to the redesigned survey, we reiterate the recommendations made in the Commission's 1993 report. Specifically, data should be collected in disaggregated form. The survey also should be revised to examine female drop-out rates, participation of girls and women in math, science, and technical programs, and disparities in testing between females and their male peers. We also recommend that the survey examine schools' treatment of pregnant and parenting teens, who frequently are denied equal access to education programming, and track schools' progress in addressing sexual and racial harassment — determining whether schools have policies and procedures as required under the law and the number of complaints they handle. Such data will greatly enhance civil rights enforcement.

III. Funding for Programs that Address Gender Equity

The transition in the 104th Congress toward more discretion in the states and a reduced role for the federal government had a devastating effect on two programs designed to focus on and address the issue of gender equity in education: the Women's Educational Equity Act (WEEA) and Title IV state educational agencies. WEEA and Title IV state equity programs have led to the development of model programs, materials, and curricula designed to put an end to gender bias in education. In short, over the past 20 years, these programs have helped change the educational landscape for girls and young women. In the course of two funding cycles, both programs were targeted for elimination by Congress.

A. Women's Educational Equity Act

WEEA is the only federal program that focuses specifically on increasing educational opportunity for women and girls. Over the past 20 years, WEEA projects have been on the forefront of addressing the myriad of barriers to education facing girls and women: sexual harassment, biased standardized testing, tracking of girls into traditional low-paying careers, among others. WEEA projects have developed strategies to overcome those barriers and encouraged girls and young women to achieve. Notwithstanding these achievements, Congress targeted WEEA for elimination.

For fiscal year 1996, WEEA, which survived attacks during the Reagan and Bush Administrations, received no funding whatsoever, despite an Administration request for $4 million. Recognizing the significance of WEEA programs in addressing gender bias, Education Secretary Riley committed to an agency-wide effort to salvage some portion of WEEA. His efforts resulted in several individual WEEA projects being funded for FY 1996. WEEA received funding for fiscal year 1997, due in large part to the leadership of members of the Congressional Caucus for Women's Issues, who stood up to efforts to erase WEEA. WEEA ultimately was funded at $2 million, levels that approximate those during the Reagan and Bush years.

B. Title IV State Educational Agencies

Title IV-funded state educational agencies programs also have been critical to efforts to attain gender equity in schools. These programs, part of the Training and Advisory Services program, provide schools in each of the 50 states with training, materials, and strategies to make gender equity a reality in education.

Specifically, Title IV state educational agencies give schools guidance and technical assistance on complying with Title IX by providing briefings, updates, and resources for all school districts. In addition, Title IV state educational agencies coordinate the gender equity provisions of education reform laws such as the Improving America's Schools Act. Title IV state educational agencies also assist state educators in developing strategies to increase participation of girls in math and science and preventing sexual harassment, for example.

These programs, which needed funding at levels of $7 million, received no funding for FY 1996 or FY 1997. As a result, their important services to state and local educators and administrators will be lost. Even though Secretary Riley sent a letter to states, encouraging them to use other funding to keep these programs in operation, only a fraction of Title IV programs have survived. Some state educational agencies have gone so far to state that they no longer provide technical assistance around gender equity issues, which clearly violates Title IX. The National Coalition for Women and Girls in Education has requested that the Department inform states of their obligation under the law to provide such assistance.

More importantly, however, the Administration must advocate strongly for full funding of programs that address gender equity in education. The elimination of Title IV programs demonstrates that competing interests and diminished financial resources mean that assuring students of an education free from sex bias unfortunately is not a priority.

IV. School-to-Work Implementation

In the Commission's 1995 report, we highlighted the School-to-Work Opportunities Act, one of the key pieces of the Clinton Administration's education reform efforts. School-to-Work has specific provisions aimed at breaking through historic barriers to educational attainment for girls and young women, and other historically underserved students, giving states a framework to provide female students with education and training opportunities that will help them reach beyond jobs that pay poorly and offer little or no advancement potential. In this regard, School-to-Work represents an end to traditional educational approaches, recognizing the importance of ensuring that *every* student is afforded an equal opportunity to achieve to her or his potential. Attendant to that recognition, however, is the understanding that merely saying all students can and must learn is meaningless without specific action focused upon those who traditionally have been left behind in school, and, as a result, left behind economically, such as women, students of color, and those with disabilities. By requiring grantees to serve "all students," provide them with training in "all aspects of the industry," and ensure that women and students receive training in fields that are not traditional for their race or gender, School-to-Work has the promise of integrating concepts of equity from kindergarten through college, a promise of particular importance to young women. More attention from the Departments of Education, Labor, and the federal School-to-Work Office is necessary to ensure that the equity provisions are implemented as Congress intended.

The School-to-Work Office (STW Office), a hybrid agency that falls under the auspices of the

Departments of Education and Labor, is charged with implementing this law. The STW Office administers grants in the 37 states that have received implementation funds from the federal government. In addition, the STW Office provides technical assistance through its Learning Center and through a Resource Bank, comprised of more than 100 organizations for which implementation states have a line of credit to obtain help in building School-to-Work systems. The STW Office also must monitor implementation of the Act and, through the Departments of Education and Labor, provide Congress with a report on the progress of School-to-Work. An advisory council, comprised of more than 40 members ranging from students to former Miss America Shawntel Smith, provides additional guidance to the STW Office, recommending, for instance, that the office concentrate less on enforcement and monitoring of the Act and more on providing technical assistance. This direction, however, threatens to undermine the promise of the Act to ensure that gender or race, for example, are not barriers to the educational opportunities School-to-Work can provide.

As states and other grantees go about the important work of implementing School-to-Work, there is no emphasis on — or recognition of — the equity provisions. For example, School-to-Work programs identified as "promising" by Jobs for the Future have made little progress in ensuring that sex segregation is not a problem. The Craftsmanship 2000 program in Tulsa, Oklahoma, which offers a program in metalworking is predominately male: women comprise only 21% of enrollees. In contrast, the Kalamazoo County Health Occupations Program in Michigan is overwhelmingly comprised of women — 77% of enrollees are female, 23% are male.[10] Predictably, the students taking advantage of both these programs primarily are conforming to the traditional notions of what sorts of jobs are for men or women, which only perpetuates occupational segregation and the disparity in earnings potential for women.

The sex segregation of these "promising" programs indicates that gender equity must be integrated in emerging School-to-Work systems from the very beginning. In order to accomplish this goal, the STW Office must provide leadership and guidance to grantees, informing them of the Act's requirements with regard to gender equity, identifying model School-to-Work programs and system-building efforts, and ensuring that equity is integrated in its own implementation efforts, including its evaluation of School-to-Work's progress thus far. In this connection, the STW Office should determine how grantees are ensuring that "all students" have access to School-to-Work programs, with an emphasis on identifying whether and how young women are participating in programming that is not traditional for their sex or race, whether young women are gaining training in all aspects of an industry, and whether schools and employers are providing them with environments that are free from racial and sexual harassment, all which the Act requires. School-to-Work has many of the tools to address these persistent inequities; however, the extent to which gender equity becomes a reality in school systems across the country is directly related to the involvement of the STW Office and the Departments of Education and Labor and their efforts to ensure that implementation grantees make equality of access an integral part of School-to-Work.

Conclusion

The Clinton Administration has taken many significant steps toward making equality of educational opportunity accessible for girls and women. However, more progress is needed. As the VMI case demonstrates, the attitudes underlying discriminatory practices are long-standing and, in some cases, unyielding. Elimination of the persistent barrier of sex discrimination is consistent with this Administration's demonstrated commitment to ensuring that all students receive a first class education. We urge the Administration to enhance its efforts to assure girls and women that their academic opportunities will be dictated by their interests and capabilities, not their sex.

Endnotes

[1] Brief of United States, Petitioner, *United States of America v. Commonwealth of Virginia*, Case No. 94-1941 (1995) 37-38.

[2] The Department of Justice intervened as an additional plaintiff in a similar constitutional challenge to the Citadel's exclusion of women. The Fourth Circuit, as it did in the VMI case, permitted the state to present a plan to create a separate all-women's program in the district court to remedy the constitutional violation in that case. However, the remedial proceedings in the district court were stayed pending resolution of the VMI case in the Supreme Court. Immediately after the Court ruled against VMI, the Citadel announced plans to open its doors to women.

[3] DOJ Brief at 12, quoting the district opinion.

[4] DOJ Brief at 34 (citation omitted).

[5] Strategic Plan of Office for Civil Rights (October 14, 1993).

[6] OCR Fiscal Year 1995 Annual Report to Congress, Appendix A.

[7] *Id.* at 1.

[8] *Id.* at 3.

[9] "Federal Bias Watchdog Overzealous, Some Say," *The Washington Times,* November 12, 1996, A1.

[10] Hilary Kopp and Richard Kazis, with Andrew Churchill, *Promising Practices: A Study of Ten School-to-Career Programs* (Jobs for the Future 1995).

Chapter XX

The Clinton Administration Record on Equal Educational Opportunity in Elementary and Secondary Education

by Patricia A. Brannan

Introduction

As the Citizens' Commission's 1995 report noted, the tone for civil rights enforcement in elementary and secondary education was set by Deval Patrick at his swearing-in as the Assistant Attorney General for Civil Rights, where he stated that restoration of civil rights is part of a "great moral imperative" for our nation.[1] That tone, so different from that of the previous two administrations, has held at the Justice Department and the Office for Civil Rights of the Department of Education. At the start of the second Clinton term, however, there is a marked lack of initiative in bringing new civil rights litigation affecting elementary and secondary education. The efforts of the Administration seem focused on defensive battles, as more and more school districts seek to be released from school desegregation decrees, and reverse discrimination cases loom as an ever more prominent threat.

Patrick will step down as Assistant Attorney General for the Civil Rights Division in January 1997. There can be no dispute that he has been a tireless and focused advocate for diversity and equality of opportunity, in education and other aspects of American life. Much of the test of whether the Justice Department can build on the energy of the first term and take some initiatives that will begin to define equal opportunity in education for the twenty-first century will depend on the President's nominee for the Assistant Attorney General post. The window for new initiatives in educational equity no doubt will be small as the pressure builds toward the election year 2000. An early nomination of an undisputed and seasoned advocate for racial and ethnic justice is imperative if the Department is to develop its own agenda on the issue of equity in education.

I. School Desegregation and Unitary Status Issues

Since the publication of the Commission's most recent report in January 1995, the United States agreed to participate as an *amicus* on the side of the plaintiff school children and school district in *Jenkins v. Missouri*,[2] at that time pending before the United States Supreme Court. The United States argued in support of the continuation of the educational components of the remedy in Kansas City ordered by the district court and affirmed by the United States Court of Appeals for the Eighth Circuit. It strongly advocated that an order to provide educational remedies as part of a desegregation decree should not be lifted as part of a declaration of unitary status until the moving party demonstrates that all vestiges of segregation have been removed from the school district in the area of quality of education.

The Court reversed and remanded, ruling that the scope of the remedy ordered by the district court was too broad, because it was directed at least in part at the attraction of white students from area suburban districts into the Kansas City school district.[3] The Court found that this was an interdistrict objective that was not supported by an interdistrict violation. The Court held that, on remand, each new component of the remedy should be tested against its usefulness in moving the school district toward unitary status, given the scope of the violation originally found by the district court.[4]

Jenkins is the most recent school desegregation case taken by the Supreme Court. The willingness of the United States to participate in the case, in which it had earlier been a defendant on housing issues, was a strong indication of the commitment of the Clinton Justice Department to effective school desegregation and judicial authority necessary to enter and enforce such orders.

The Department of Justice still is a plaintiff in some hundreds of school desegregation cases that remain open.[5] The Department does not have a comprehensive docket of school desegregation cases in which it is a party. A spokesperson for the Department describes the last two years as a time during which the United States has been on the defense, scrutinizing and testing the claims of school districts that they have achieved unitary status and should be relieved of any further desegregation responsibilities under federal court order.[6]

The last two years have not seen the development of a comprehensive set of principles or guidelines that govern the handling of the Department's school desegregation litigation. However, one encouraging step toward focusing the resources of the Department on the most serious cases (including some meaningful enforcement efforts and review of remedies for effectiveness before unitary status motions are filed) is the establishment by the Justice Department's Civil Rights Division of working groups to tackle various issues, including the unitary status issue in its school desegregation litigation.[7] The goal of the unitary status group is to develop a comprehensive approach to the handling of unitary status motions and other desegregation issues.

This is a key step, because the filing of motions for unitary status by school district defendants is driving much of the Department's litigation activity on school desegregation. Thus, the Department has found itself in some situations spending substantial resources holding a school district to its proof, even though that district has been relatively responsive on issues of equal educational opportunity, while in other instances, districts that have wavered from their obligations, or ignored them for decades, remain unexamined.

This is the case because the school district defendants filing motions in any given year are not necessarily those that have performed relatively well in comparison to their counterparts nationally. School district defendants that have done a good job of compliance with court orders and providing equal educational opportunity in school settings that do not bear the scars of segregation may not feel compelled to file a motion, for example, if they are content to continue implementing their desegregation plans. Other school districts may be anxious to terminate federal court jurisdiction and be relieved of their desegregation obligations, even if they have not done a good job of eliminating the vestiges of segregation. In other districts, the federal court litigation, while still pending, may have been so long inactive that the school district representatives no longer realize that they have desegregation obligations, or may be content to let the case lie rather than filing a unitary status motion that can stir up new interest on the part of the Justice Department or other plaintiffs.

The resources that would be required to inventory and review the entire docket of school desegregation cases in which the United States is a plaintiff would be substantial. With four more years in which to complete the task, the Justice Department cannot begin soon enough. The litigation risk it faces by not accomplishing this task extends beyond the problem of using its resources to oppose motions for unitary status in cases in which it is in a relatively weak position. The Department also is missing the opportunity to recommend any shape or direction to the remedy in many of these cases until the point of unitary status. This is a serious strategic weakness. Especially when a case has been in progress for some time, and a school district has generated enthusiasm in parts of the local community for an end of federal court jurisdiction and a declaration of unitary status, an effort by the United States to change or expand the remedy as part of its opposition to unitary status may simply come too late.

II. The Attack on Voluntary Race-Sensitive Decision Making in Elementary and Secondary Education

The last two years have seen a significant upturn in litigation attacking the use by educational institutions of race as a factor in decision making. In perhaps the most well-known case in this area, *Hopwood v. Texas,* a suit by four white applicants who were denied admission to the University of Texas Law School, the United States Court of Appeals for the Fifth Circuit struck down the challenged admissions program, holding that its use of race-based criteria was unlawful. The same phenomenon is manifesting itself in the area of elementary and secondary education.

On August 8, 1996, a divided United States Court of Appeals for the Third Circuit ruled 9-4 that the Piscataway, New Jersey School Board violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, by seeking to foster racial diversity and taking race into account in deciding which of two equally senior and equally qualified teachers to lay off.[8]

In *Taxman,* the majority stated the issue broadly — "whether Title VII permits an employer with a racially balanced workforce to grant a non-remedial preference in order to promote 'racial diversity'"[9] The majority also stated its holding broadly — "Given the clear anti-discrimination mandate of Title VII, a non-remedial affirmative action plan, even one with a laudable purpose, cannot pass muster."[10] Observing that there is no congressional recognition of diversity as a Title VII objective requiring accommodation, the majority reasoned that the racial diversity purpose of the school district's affirmative action policy did not mirror the purposes of Title VII, namely, ending discrimination in the workplace and remedying past discrimination there.[11]

The court also found that the school district policy was flawed in its failure to define "racial diversity" and its unlimited duration; in addition, according to the court, the school district had imposed an excessive burden by laying off the tenured non-minority teacher. The court affirmed the damage award to Taxman, including back pay, fringe benefits, and prejudgment interest, but concluded that the district court had properly dismissed her punitive damages claim.

The involvement of the United States in the *Taxman* case was unusual, and highlighted the political volatility of the affirmative action issue. After Taxman filed a discrimination complaint with the Equal Employment Opportunity Commission, the United States under the Bush Administration brought suit challenging the school district's action. On appeal, the United States, now speaking through the Clinton Administration appointees in the Department of Justice, sought to change sides and become an *amicus curiae* in support of the school district. The Third Circuit denied the United States' request and treated it as a motion to withdraw as a party, which the court granted.

The school district has filed a petition for certiorari in the United States Supreme Court. The United States has not yet participated in that proceeding, and it is unclear whether it will do so.

Beyond issues of employment, student assignments that take race into account are under attack as well. A highly publicized case, in which the United States was not involved, was settled recently, and has stirred up the student assignment issue nationally. In *McLaughlin v. Boston School Committee,*[12] a parent challenged his daughter's rejection from the Boston Latin School, a highly competitive academic secondary school in the Boston Public School System. Although the Boston Public Schools had been declared unitary in student assignment years before,[13] the system continued to admit African-American and Hispanic students under a "set aside" of 35% of entry level seats. Julia McLaughlin, who is white, had a test score for admission that would have supported her admission had she been African American or Hispanic, but that ranked her as 479 among students eligible for 440 seats.

The tide in the *McLaughlin* case clearly turned when Judge Garrity, who presided over the Boston school desegregation case, granted her a preliminary injunction for admission to Boston Latin, and signaled that there were less intrusive ways of obtaining diversity in student enrollment at Boston Latin than the rigid system then in use.[14] The *McLaughlin* case was widely publicized, and likely will breed further legal challenges to school districts that voluntarily foster diversity in student enrollment. The United States is unlikely to be named as a party to these cases, because if the underlying school desegregation case has ended, a challenge to voluntary desegregation will take the form of litigation by a parent or group of parents directly against the school district. The support of the United States as an *amicus* will be useful in such cases, however, to make clear to the courts involved the importance and legal support for non-intrusive and locally developed voluntary measures.

The Justice Department has shown resolve in dealing with such issues, not only in the employment context in *Taxman*, but in an unusual challenge to a student assignment plan in *United States v. Georgia* (Troup County).[15] In Troup County, a group of applicants for intervention as defendants challenged a consent decree in which the United States, plaintiff intervenors represented by the NAACP Legal Defense and Educational Fund, Inc., the State of Georgia, and the defendant school district agreed to a new countywide student assignment plan after three formerly separate municipal school districts voted to give up their charters and merge into the County district. At the threshold of the first year of implementation of the student assignment plan, the applicants for intervention sought an injunction to keep the plan from taking effect, because the race of their children was among the factors considered in assigning their children to school. The school districts in question have never been held to have achieved unitary status.

The Troup County case thus is one long step removed from a case like *McLaughlin*, in which unitary status had been achieved. The applicants for intervention in Troup County make the novel argument that even a desegregation plan cannot take account of the race of students in assigning them to schools.

The Justice Department has fought vigorously to defend its consent decree in the Troup County case. A hearing is expected before Judge Robert Vining in the late winter or spring of 1997. Continued vigilance by the Justice Department on such challenges will be imperative.

III. Office for Civil Rights of the Department of Education

In each of the Fiscal Years 1994, 1995, and 1996, the Office for Civil Rights of the Department of Education ("OCR") closed more complaints than it received, thus chipping away at the backlog of unresolved complaints that the Clinton Administration inherited. Total complaints received and closed for each of the last three years are as follows:[16]

	FY 1994	FY 1995	FY 1996
Complaints Rec'd	5276	4988	4830
Complaints Closed	5684	5580	4887

The level of complaints involving elementary and secondary education remained at a steady 65% for each of the three years. Complaints involving discrimination based on race or national origin overall (involving postsecondary as well as elementary and secondary education) declined slightly from 21% of the total in FY 1994, to 20% in 1995, to 18% in 1996.

Fiscal Years 1995 and 1996 were the first full years in which OCR applied the Investigative Guidance for Racial Incidents and Harassment that it had announced in March 1994.[17] The level of complaints alleging racial harassment in elementary and secondary education has remained fairly steady over recent years, at 205 in 1994, 185 in 1995, and 221 in 1996. The proportion of those complaints involving students, as opposed to employees, has inched up in each of the three years, from 85% in 1994, to 90% in 1995, to 94% in 1996.

OCR also initiates compliance reviews independent of specific complaints. The focus of those reviews has shifted increasingly to elementary and secondary education. In FY 1994, 78% of the 144 reviews (112) were in elementary and secondary education. By FY 1995, elementary and secondary reviews represented 85% of the reviews (82 of 96) and in FY 1996, 99% of the reviews (144 of 145).

OCR does not publish data on the number of compliance reviews or complaints that result in referrals to the Justice Department for legal action, but the available press reports and docket information make clear that the number remains very small. Coordination between OCR and the Justice Department working group on racial and sexual harassment will be important for assuring that the most significant cases identified by OCR, through complaints and compliance reviews, are referred for further action.

Conclusion

The prompt appointment of a vigorous advocate of equity in educational opportunity as the new Associate Attorney General for Civil Rights is the best forward step that the Clinton Administration can take toward more vigorous civil rights enforcement in elementary and secondary education. Organizing the Department's caseload so that the Department initiates action on enforcement and the scope of remedies, rather than using most of its energy responding to unitary status motions by school districts, will be crucial to enable the Department to participate in defining the next generation of equity issues that will emerge in education.

Endnotes

[1] *New Challenges: The Civil Rights Record of the Clinton Administration Mid-Term,* at 112, Citizens' Commission on Civil Rights (January 1995).

[2] 115 S Ct. 2038 (1995). The author represented the Kansas City, Missouri School District in the Supreme Court and other proceedings in the *Jenkins* case. The author is involved in school desegregation and other civil rights cases, in many of which the United States also is a party.

[3] 115 S Ct. at 2052-54.

[4] 115 S Ct. at 2055-56.

[5] Interview with Isabelle Katz Pinzler, Civil Rights Division of the Department of Justice, December 13, 1996.

[6] *Id.*

[7] *Id.* Other working groups will address post-*Hopwood* (affirmative action in admissions) issues, testing issues, racial and sexual harassment, limited English proficient students, minorities in special education, and push out/expulsion/suspension.

[8] *Taxman v. Board of Education of the Town of Piscataway,* 91 F.3d 1547 (3d Cir. 1996)(*en banc*).

[9] 91 F.3d 1549-50.

[10] 91 F.3d at 1550.

[11] *Id.* at 1558-65.

[12] 938 F. Supp. 1001 (D. Mass. 1996).

[13] *Morgan v. Nucci,* 831 F.2d 313, 326 (1st Cir. 1987).

[14] 938 F. Supp. at 1016-18.

[15] *United States and Ridley, et al v. State of Georgia,* Civil Action No. 1:69-CV-12972-RLV (N.D. Ga.).

[16] Based on data compiled by OCR, and dated January 3, 1995, December 14, 1995, and October 29, 1996

[17] 59 Fed Reg. 11448 (March 10, 1994).

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Working Papers

Federal Resources and Funding

Chapter IV
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Administration of Justice

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U.S. Commission on Civil Rights

Chapter VI
The Performance of the
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Affirmative Action

Chapter IX

Affirmative Action in Public Contracting: The Record of the Last Two Years

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Welfare Reform

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Immigration

Chapter XI

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Rights of Persons with Disabilities

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The Clinton Administration and the Americans with Disabilities Act

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Chapter XIII

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Hate Crimes

Chapter XIV

Federal Action to Confront Hate Violence: A Mixed Record of Achievement and Missed Opportunities

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English-Only Requirements

Chapter XV

The Debate over English-Only/Official English

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Voting

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Chapter XVII

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Chapter XVIII

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Chapter XIX

Many Rivers to Cross: Gender Equity in the Clinton Administration

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Chapter XX

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